

**EXTRA EXCERPT OF RECORD.**

**APPEAL TO COURT OF THE UNITED STATES,**

**UNITED STATES DISTRICT COURT,**

**No. 247**

**GEORGE W. ISHBEL PLAINTIFF IN ERROR,**

**vs.**

**THE STATE OF CALIFORNIA, DEFENDANT IN ERROR.**

**IN THE DISTRICT COURT OF CALIFORNIA,**

**AT SACRAMENTO, CALIFORNIA,**

**ON APRIL 10, 1856,**

**AND ON APRIL 11, 1856,**

**AND ON APRIL 12, 1856,**

**AND ON APRIL 13, 1856,**

**AND ON APRIL 14, 1856,**

**AND ON APRIL 15, 1856,**

**AND ON APRIL 16, 1856,**

**AND ON APRIL 17, 1856,**

**AND ON APRIL 18, 1856,**

**AND ON APRIL 19, 1856,**

**AND ON APRIL 20, 1856,**

**AND ON APRIL 21, 1856,**

**AND ON APRIL 22, 1856,**

**AND ON APRIL 23, 1856,**

**AND ON APRIL 24, 1856,**

**AND ON APRIL 25, 1856,**

**AND ON APRIL 26, 1856,**

**AND ON APRIL 27, 1856,**

**AND ON APRIL 28, 1856,**

**AND ON APRIL 29, 1856,**

**AND ON APRIL 30, 1856,**

**AND ON MAY 1, 1856,**

**AND ON MAY 2, 1856,**

**AND ON MAY 3, 1856,**

**AND ON MAY 4, 1856,**

**AND ON MAY 5, 1856,**

**AND ON MAY 6, 1856,**

**AND ON MAY 7, 1856,**

**AND ON MAY 8, 1856,**

**AND ON MAY 9, 1856,**

**AND ON MAY 10, 1856,**

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**AND ON MAY 26, 1856,**

**AND ON MAY 27, 1856,**

**AND ON MAY 28, 1856,**

**AND ON MAY 29, 1856,**

**AND ON MAY 30, 1856,**

**AND ON MAY 31, 1856,**

**AND ON JUNE 1, 1856,**

**AND ON JUNE 2, 1856,**

**AND ON JUNE 3, 1856,**

**AND ON JUNE 4, 1856,**

**AND ON JUNE 5, 1856,**

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**AND ON JUNE 27, 1856,**

**AND ON JUNE 28, 1856,**

**AND ON JUNE 29, 1856,**

**AND ON JUNE 30, 1856,**

(16,828.)

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 265.

GEORGE M. ISRAEL, PLAINTIFF IN ERROR,

*v.s.*CHARLES F. GALE, AS RECEIVER OF THE ELMIRA  
NATIONAL BANK.IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR  
THE SECOND CIRCUIT.

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GEORGE M. ISRAEL VS. CHARLES F. GALE, RECEIVER, ETC. 1

a United States Circuit Court of Appeals for the Second Circuit.

GEORGE M. ISRAEL, Plaintiff in Error,

*vs.*

CHARLES DAVIS, as Receiver of the Elmira National Bank, Defendant in Error.

*Transcript of Record.*

Error to the circuit court of the United States for the southern district of New York.

Printed under the direction of the clerk.

[Stamped:] United States circuit court of appeals, second circuit.  
Filed Mar. 12, 1896. James C. Reed, clerk.

1 UNITED STATES OF AMERICA, *ss.*:

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Charles Davis, as receiver of the Elmira national bank plaintiff, and George M. Israel, defendant, a manifest error hath happened, to the great damage of the said defendant, George M. Israel, as is said and appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the judges of the United States circuit court of appeals for the second circuit, at the city of New York, together with this writ, so that you have the same at the said place, before the judges aforesaid, on the 10th day of March, 1896, that the record and proceedings aforesaid being inspected, the said judges of the United States circuit court of appeals for the second circuit may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice [L. S.] of the Supreme Court of the United States, this 10th day of February, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the United States the one hundred and twentieth.

JOHN A. SHIELDS,  
*Clerk of the Circuit Court of the United States of America  
for the Southern District of New York,  
in the Second Circuit.*

The foregoing writ is hereby allowed.

E. H. LACOMBE,  
*U. S. Circuit Judge.*

UNITED STATES OF AMERICA,  
*Southern District of New York,* }<sup>ss:</sup>

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from three to sixty-four, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of George M. Israel, plaintiff in error, against Charles Davis, as receiver of the Elmira national bank, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 20th day of February, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the United States the one hundred and twentieth.

JOHN A. SHIELDS, Clerk.

3      United States Circuit Court, Southern District of New York.

CHARLES DAVIS, as Receiver of the Elmira National Bank, }  
*against*  
 GEORGE M. ISRAEL. }

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, at the city of New York, this 8th day of August, in the year one thousand eight hundred and ninety-five.

[SEAL.]

JOHN A. SHIELDS, Clerk.

Bissell, Sicard, Bissell & Carey, plaintiff's attorneys.

Office and post-office address, 284 Main St., Buffalo, New York.

4      Circuit Court of the United States for the Southern District of New York.

CHARLES DAVIS, as Receiver of the Elmira National Bank, }  
*Plaintiff,*  
*against*  
 GEORGE M. ISRAEL, Defendant. }

The above-named plaintiff complains of the above-named defendant, and for cause of action alleges as follows:

1. That at the times hereinafter mentioned the Elmira national

bank was a national banking association, organized and incorporated on or about the 1st day of August, 1887, under and by virtue of the provisions of the statutes of the United States in such case made and provided, passed June 3d, 1864, and the acts amendatory thereof, under the name and title of the Elmira national bank.

2. That the said bank carried on the business of banking at the city of Elmira, in said northern district of New York, from August, 1887, down to and until the 23d day of May, 1893, when the said bank suspended and discontinued its business, and has not since resumed the same.

3. That on the 26th day of May, 1893, James H. Eckels, then being Comptroller of the Currency of the United States, and being thereunto duly authorized by law, did declare the said bank insolvent, and did thereupon appoint this plaintiff, Charles Davis, as receiver of the said Elmira national bank and all the property and assets thereof, by a certificate in writing, under his hand and official seal, dated on said 26th day of May, 1893.

5  
4. That this plaintiff thereupon duly qualified as such receiver, as required by law, and on the 2d day of June, 1893, entered upon his trust as such receiver, and took possession of the books, records and assets of every description of the said bank, and has ever since been, and still is, acting and engaged in the discharge of his duties as such receiver, among which duties is the collection of all debts due the said Elmira national bank.

5. And the said plaintiff further alleges that on the 4th day of May, 1893, at the city of New York, county of New York, N. Y., the said defendant, George M. Israel, made his certain promissory note in writing, in the words and figures following, to wit:

"\$17,000.00.

NEW YORK, May 4th, 1893.

On demand after date I promise to pay to the order of Elmira national bank seventeen thousand dollars, payable at the Elmira national bank. Value received.

No. 10996. Due —.

GEO. M. ISRAEL."

And then and there delivered the same to the said Elmira national bank for value, which thereupon became the owner and holder thereof, and continued to hold and own the same until the 26th day of May, 1893, when, as hereinbefore set forth, this plaintiff, as receiver as aforesaid, became the owner of the same by virtue of the transfer of all the assets of the said bank to him, said receiver.

6  
6. That the said promissory note has been duly presented for payment on behalf of the holder thereof, at the place where the same was made payable, to wit: at the Elmira national bank, in Elmira aforesaid, and payment thereof demanded and refused.

7. That the plaintiff, as such receiver, is still the owner and holder of said promissory note, and that the same has not been paid nor any part thereof. That there is now due and payable thereon

to this plaintiff from the said defendant the sum of \$17,000, with interest thereon from the 4th day of May, 1893.

Wherefore the plaintiff demands judgment against the said defendant for the sum of seventeen thousand dollars (\$17,000), with interest thereon from the 4th day of May, 1893, besides the costs of this action.

BISSELL, SICARD, BISSELL & CAREY,  
Attorneys for Plaintiff, 284 Main Street, Buffalo, N. Y.

NORTHERN DISTRICT OF NEW YORK, } ss:  
County of Chemung,

Charles Davis, being duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

CHAS. DAVIS.

Sworn to before me this 5th day of June, 1895.

[SEAL.]

M. H. EATON,  
Notary Public.

(Endorsed:) U. S. circuit court, southern district of New York.

Charles Davis, receiver, &c., vs. George M. Israel. Com-  
7 plaint. Bissell, Sicard, Bissell & Carey, attorneys for plain-  
tiff, office and P. O. address, 284 Main street, Buffalo, N. Y., I hereby certify that on the 13th day of August, 1895, at the city of New York, in my district, I personally served the within summons and complaint upon the within-named George M. Israel, by exhibiting to him the within originals, and at the same time leaving with him a copy of each thereof. John H. McCarty, United States marshal, southern district of New York. Dated Sep. 17, 1895.

U. S. Circuit Court, Southern District of New York.

CHARLES DAVIS, as Receiver of the Elmira National Bank, }  
Plaintiff,  
against }  
GEORGE M. ISRAEL, Defendant.

The above-named defendant, by his solicitor, Frank Sullivan Smith, for answer to the plaintiff's complaint herein:

I. Admits, upon information and belief, the allegations contained in the first subdivision of said complaint.

II. Defendant admits that said bank carried on the business of banking at the city of Elmira, in the northern district of New York, but defendant alleges that he has no knowledge or information sufficient to form a belief as to whether, on the 23d day of May, 8 1893, the said bank suspended and discontinued its business, and has not since resumed the same.

III. Answering the allegations contained in the third and fourth subdivision of said complaint, defendant alleges that he has no knowledge or information sufficient to form a belief as to the truth of such allegations, and therefore denies the same.

IV. Answering the allegations contained in the fifth subdivision of said complaint, defendant admits that on or about the fourth day of May, 1893, at the city of New York, he made his certain promissory note in writing in the words and figures substantially as set forth in said complaint. Defendant denies that he then and there delivered the same to said Elmira national bank for value, which thereupon became the owner and holder thereof. Defendant alleges that he has no knowledge or information sufficient to form a belief as to the truth of the remaining allegations in said paragraph contained.

Defendant alleges that immediately upon making his certain promissory note, as aforesaid, he delivered the same to one David C. Robinson; and defendant alleges that said note was entirely without consideration, and void, and no value therefor was received by this defendant either from said David C. Robinson, said Elmira national bank or from any other source. And this defendant further alleges that said David C. Robinson was in no way authorized to act as the agent of this defendant with regard to said note, and if the same was delivered to said Elmira national bank by said David C. Robinson, said Robinson so delivered said note to said bank for his own use, benefit and account, and not as the agent of this defendant, and in no manner for the use, benefit or account of this defendant; all of which facts were well known to said Elmira national bank and its officers, as this defendant is informed and believes.

9 V. Answering the allegations contained in the sixth and seventh subdivisions of said complaint, this defendant alleges that he has no knowledge or information sufficient to form a belief as to the truth of the allegations therein contained.

FRANK SULLIVAN SMITH,  
*Solicitor for Defendant.*

UNITED STATES OF AMERICA,  
Southern District of New York, City and County of New York, }  
} 88:

George M. Israel, being duly sworn, deposes and says: That he is the defendant in the above entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

GEORGE M. ISRAEL.

Sworn to and subscribed before me this 20th day of September, 1895.

FREDERIC H. RIDGWAY,  
*Notary Public (100), City and County of New York.*

(Endorsed:) U. S. circuit court, southern district of New York. Charles Davis, as receiver, &c., plaintiff, against George M. Israel, defendant. Answer. Frank Sullivan Smith, solicitor for defendant, No. 54 Wall street, New York, N. Y. Received 24 day of Sept., 1895.

10 U. S. Circuit Court, Southern District of New York.

CHARLES DAVIS, as Receiver of the Elmira National Bank, Plaintiff,  
against  
GEORGE M. ISRAEL, Defendant. } Amended Answer.

The above-named defendant by his attorney, Frank Sullivan Smith, for an amended answer to the plaintiff's complaint herein:

I. Admits, upon information and belief, the allegations contained in the first subdivision of said complaint.

II. Defendant admits that said bank carried on the business of banking at the city of Elmira, in the northern district of New York, but defendant alleges that he has no knowledge or information sufficient to form a belief as to whether on the 23d day of May, 1893, the said bank suspended and discontinued its business, and has not since resumed the same.

III. Answering the allegations contained in the third and fourth subdivisions of said complaint, defendant alleges that he has no knowledge or information sufficient to form a belief as to the truth of such allegations, and therefore denies the same.

IV. Answering the allegations contained in the fifth subdivision of said complaint, defendant admits that on or about the 4th 11 day of May, 1893, at the city of New York, county and State of New York, he made his certain promissory note in writing, in the words and figures substantially as set forth in said complaint. Defendant denies that he then and there delivered the same to said Elmira national bank for value, which thereupon became the owner and holder thereof. Defendant alleges that he has no knowledge or information sufficient to form a belief as to the truth of the remaining allegations in said paragraph contained.

Defendant alleges that immediately upon making his certain promissory note, as aforesaid, he delivered the same to one David C. Robinson; and defendant alleges that said note was entirely without consideration, and void, and no value therefor was received by this defendant, either from said David C. Robinson, said Elmira national bank or from any other source. And this defendant further alleges that said David C. Robinson was in no way authorized to act as the agent of this defendant with regard to said note, and if the same was delivered to said Elmira national bank by said David C. Robinson, said Robinson so delivered said note to said bank for his own use, benefit and account, and not as the agent for this defendant, and in no way for the use, benefit or account of this defendant; all of which facts were well known to said Elmira national bank and its officers, as this defendant is informed and believes.

V. Answering the allegations contained in the sixth and seventh subdivisions of said complaint, this defendant denies that there is now due and payable on said note to the plaintiff from this defendant the sum of \$17,000, with interest thereon from the 4th day of May, 1893. Defendant alleges that he has no knowledge or information sufficient to form a belief as to the truth of the remaining allegation in said sixth and seventh subdivisions of said complaint.

12 VI. For a second, separate and distinct defense to the cause of action alleged in the plaintiff's complaint herein, defendant alleges, upon information and belief, that on the said 4th day of May, 1893, at the time he made his certain promissory note in writing, in the words and figures substantially as set forth in said plaintiff's complaint, the said David C. Robinson, to whom defendant delivered said note as aforesaid, was a depositor in said Elmira national bank and a director thereof and controlled and directed the affairs of said bank, and had overdrawn his account at said bank in an amount exceeding the amount for which said note was drawn, to wit, \$17,000, and that said Robinson delivered said note to said Elmira national bank to make good in part the amount of said overdraft; that said bank parted with no value upon the receipt of said note from said Robinson, but merely gave him credit on account for the amount thereof. Defendant further alleges, upon information and belief, that at the time of the making of said note as aforesaid the said Elmira national bank had loaned to said David C. Robinson upon his paper up to the legal limit of its right to loan to any one individual and that the note in suit was obtained from defendant and was used by said Robinson for the purpose of evading the law in procuring from said bank a greater amount of money than it was authorized to loan to one individual. That said bank and its officers, well knowing that said note was without consideration so far as this defendant is concerned, and that the same was a mere subterfuge for the obtaining of money from said bank, contrary to the limit prescribed by law, and acting in collusion with said Robinson for the accomplishment of such purpose, took said note from said Robinson and credited the proceeds thereof to said Robinson

13 to make good to that extent said Robinson's account, which was at that time overdrawn as aforesaid. That the taking of said note by said Elmira national bank, under the circumstances above stated, was *ultra vires* and unlawful, and said bank or the plaintiff herein as its receiver, never became the lawful owner and holder thereof.

Defendant further alleges that at the time he made his certain promissory note as aforesaid he was not worth the said sum of \$17,000, or any other substantial sum, and had no financial standing whatever; which facts were well known to said David C. Robinson and to said Elmira national bank, and its officers as defendant is informed and believes. And defendant alleges that he had no knowledge, at the time he delivered said note to said Robinson as aforesaid, how said note was to be used by said Robinson; and defendant believed that said Robinson would make said note good

and of value, either by securing a good endorsement to the same, or by depositing good collateral therewith in case said note was used at all by said Robinson. And defendant alleges upon information and belief, that said Elmira national bank, and its officers, well knowing defendant's inability to pay said note, or any part thereof, as aforesaid, took the said note from said Robinson, relying solely upon said Robinson's promise to pay the same; that said bank and its officers, placed no reliance upon defendant in the premises, and advanced said money to make good said Robinson's account, to the amount of said note, not upon the faith of defendant's name and responsibility, but relying wholly upon and looking solely to said Robinson for the payment thereof.

Wherefore, defendant demands judgment that the plaintiff's complaint be dismissed with costs.

FRANK SULLIVAN SMITH,  
*Attorney for Defendant.*

14      STATE OF NEW YORK,      }  
        *City and County of New York,*      }<sup>ss:</sup>

George M. Israel, being duly sworn, deposes and says, that he is the defendant in the above-entitled action; that he has read the foregoing amended answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

GEO. M. ISRAEL.

Sworn to and subscribed before me, this 11th day of October, 1895.

FREDERIC H. RIDGWAY,  
*Notary Public (100), City & County of New York.*

Endorsed: U. S. circuit court, southern district of N. Y. Charles Davis, as receiver of the Elmira nat. bank, plaintiff, against George M. Israel, defendant. Amended answer. Frank Sullivan Smith, att'y for defendant, No. 54 Wall street, New York, N. Y.

15      At a stated term of the circuit court of the United States of America, for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Tuesday, the fourteenth day of January, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable Nathaniel Shipman, circuit judge.

CHARLES DAVIS, as Receiver, &c., }  
vs.  
GEORGE M. ISRAEL. }

Now comes the plaintiff by Martin Carey, his attorney, and moves the trial of this cause.

Likewise comes the defendant by Frank Smith, his attorney.

Thereupon a jury is impaneled and the cause proceeds to trial.

After hearing the evidence for the respective parties the jury, by direction of the court, say that they find a verdict for the plaintiff for the sum of seventeen thousand dollars, with interest from the date of the commencement of the suit.

It is stipulated that the interest be computed by counsel.

An extract from the minutes.

JOHN A. SHIELDS, Clerk.

16      United States Circuit Court, Southern District of New York.

CHARLES DAVIS, as Receiver of the Elmira National Bank,)  
*against*  
 GEORGE M. ISRAEL. )

The issues in this action having been brought on for trial before the Honorable Nathaniel Shipman, one of the judges of said court and a jury, at a term thereof held on the 14th day of January, 1896, at the Federal building in the city of New York and county of New York, and the defendant appearing by his counsel, and the issues having been duly tried, and the court having directed a verdict for the plaintiff, and the jury having duly rendered a verdict for the plaintiff on the 15th day of January, 1896, for the sum of seventeen thousand dollars and the interest thereon from the 13th day of August, 1895, the date of the commencement of this action, which interest amounts to the sum of \$425.66, making the verdict amount in all to the sum of seventeen thousand four hundred twenty-five dollars and sixty-six cents and the interest on said verdict from the day it was rendered to this date having been duly computed by the clerk of this court at the rate of six per cent. per annum, which interest amounts to the sum of fifty-three dollars and eighty-two cents, which, together with the sum awarded by said verdict amounts in all to the sum of seventeen thousand four hundred seventy-nine dollars and fifty-eight cents, and the costs of said plaintiff having been duly adjusted at the sum of fifty-six  $\frac{15}{100}$  dollars:

17      Now, on motion of Bissell, Sicard, Bissell & Carey, attorneys for said plaintiff,

It is adjudged that said plaintiff do recover of said defendant the sum of seventeen thousand four hundred seventy-nine dollars and forty-eight cents (\$17,479.48), together with the sum of fifty-six  $\frac{15}{100}$  dollars costs and disbursements, amounting, in all, to the sum of seventeen thousand five hundred thirty-five  $\frac{63}{100}$  dollars (\$17,535.63).

Judgment signed and entered this 4th day of February, 1896.

JOHN A. SHIELDS, Clerk.

(Endorsed:) United States circuit court, southern district of New York. Charles Davis, as receiver, &c., vs. George M. Israel. Judgment. Bissell, Sicard, Bissell & Carey, attorneys for plff. Office and P. O. address, 284 Main street, Buffalo, N. Y. U. S. circuit court, Filed Feb. 4, 1896, 3.20 p. m. John A Shields, clerk.

United States Circuit Court, Southern District of New York.

CHARLES DAVIS, as Receiver of the Elmira National Bank,)  
 Plaintiff,  
 against  
 GEORGE M. ISRAEL, Defendant. }  
 GEORGE M. ISRAEL, Defendant.

Be it remembered that afterward, to wit, on the 14th day  
 18 of January, A. D. 1893, at a stated term of the said court  
 begun and holden in the city of New York, in and for the  
 said southern district of New York, before his Honor Nathaniel  
 Shipman, circuit judge, the issue joined in the above-stated cause  
 between the said parties (*pro ut* the pleadings), came on to be tried  
 before the said judge and a jury, the plaintiff being represented by  
 Messrs. Bissell, Sicard, Bissell & Carey, and the defendant by Frank  
 Sullivan Smith, Esq., and upon the trial of said issue in order to  
 maintain and prove the same, the attorneys for the plaintiff duly  
 put in evidence the promissory note of the defendant set forth in  
 the complaint in said cause in the words and figures following, to  
 wit:

"\$17,000.00.

NEW YORK, May 4th, 1893.

On demand after date I promise to pay to the order of Elmira  
 national bank, seventeen thousand dollars, payable at the Elmira  
 national bank. Value received.

No. 10996. Due —.

GEO. M. ISRAEL."

Counsel for the defendant admitted that Charles Davis is the receiver of the Elmira national bank.

And thereupon the plaintiff rested.

Whereupon, the defendant's attorney, to maintain and prove the issue on the part of said defendant called GEORGE M. ISRAEL, the defendant, as a witness in his own behalf, who being first duly sworn, testified among other things as follows:

"I reside in Brooklyn. I am forty-two years of age. I am at present engaged in the insurance business. In the months of April and May, 1893, I was employed in the banking-house of I. B. 19 Newcombe & Co., in Wall street, New York, as stenographer and typewriter. I was not then and I am not now a man of property. I know D. C. Robinson. At the time I made this note I did not receive any valuable thing or other consideration for the making of it; I have never received any consideration for the making of the note.

I had a conversation with D. C. Robinson at the time of the making of the note. He stated to me the object or purpose for which he desired the note. He stated to me that he desired some accommodation notes and he wanted us clerks to make them, and stated the amount. He said that the reason he wanted the accommodation notes was that he had exceeded his line of discount and could not get any more accommodation; that he was building a power-

house up there (in Elmira) and needed some money to accomplish that purpose, and if we would give him these notes, it would enable him to accomplish that; he also added that we would not be put in any position of paying them at any time; that he would take care of them and gave us positive assurance on that point, and naturally, knowing the man and thinking that he was a millionaire, as he probably was at that time, we had no hesitation about going on the notes. He said it would simply be a temporary matter. At the time I gave the note in suit other notes were given by Mollenhauer and Roll, who were with me, clerks in the office of I. B. Newcombe & Co. At that time neither of the members of the firm of I. B. Newcombe & Co. was at his place of business. Mr. Newcombe was in Bermuda, and Mr. Weidenfeld was sick with typhoid fever at Orange, N. J.

No demand has ever been made upon me for the payment of this note prior to the bringing of this suit.

I never authorized the insertion in the body of the note after the word at, of the words 'Elmira national bank.' That space 20 must have been left blank at the time, from the fact that it was filled in afterwards; my recollection is that it was left blank."

Being cross-examined by counsel for the plaintiff, the witness further testified: "I remember seeing the receiver (plaintiff) in the Times building, New York, before I was sued, and talking with him. He talked to me about this particular paper, but he made no demand for payment. He said that he did not want to sue me. I could not pay it. I never expected to. I did not pay it, but he did not make any demand for me to pay it. I was not to get any money out of this paper when I gave it; there was not any consideration mentioned. When I gave it I was not to get any money. It was given merely as a temporary accommodation paper; nobody was more surprised, when I learned it was not paid, than I was."

Whereupon the attorney for the defendant, further to maintain and prove the said issue on the part of said defendant, read the testimony of the following witnesses, taken *de bene esse*, to wit:

JACKSON RICHARDSON, who being first duly sworn, testified, among other things, as follows:

"I reside in Elmira. I have been a manufacturer of boots and shoes in Elmira for thirty-four years. I was for less than two years, in '92 and '93, president of the Elmira national bank. I was president of the Elmira national bank on the 4th day of May, 1893.

Q. How many in the board of directors?

A. It has gone from my mind, I can't tell you; I should say nine directors.

Q. How many meetings of the board of directors did you attend during that time?

A. I attended every meeting that I was in the city, monthly, 21 meetings; I was out of the city for some time and Mr. Kellogg took my place.

Q. During what time were you out of the city?

A. I couldn't say.

Q. You attended most of the meetings of directors held that year and a half?

A. Yes, sir; most of them.

Q. And the meetings were held monthly?

A. Monthly.

Q. Who does generally attend those meetings?

A. The directors.

Q. Who were they?

A. Well, I can remember one, Col. Robinson, Mr. Bush, Mr. Kellogg, Mr. Wyckoff.

Q. What Mr. Bush do you refer to?

A. J. J. Bush.

Q. Was he also cashier of the bank?

A. Yes, sir.

Q. What Col. Robinson do you refer to?

A. Col. D. C. Robinson.

Q. Who were the active members of the directory, the men who had the most to say about the business of the bank?

A. Col. D. C. Robinson was the man. Mr. Bush, of course, he was cashier; he was director also.

Q. What was the usual course of business in your meetings of the board?

A. Looked over the finances of the bank, and what the bank was doing, and how they were doing it, safely or correctly, and all those details.

Q. When you say that Col. Robinson and Mr. Bush were the most active of the directors, how did they display their activity?

A. By showing the standing of the bank—that is, especially Mr. Bush—and giving us a statement of how the bank was working.

Q. Was there any part of the business which was deputed to Col. Robinson, or of which he took principal charge?

A. No; I think not.

22 Q. Do you remember whether he was on any committees with the directors?

A. My impression is he was not.

Q. Then why do you say he was one of the most active of the directors?

A. Well, he and Mr. Bush consulted together as much, perhaps more, than others.

Q. How do you know they consulted together?

A. Well, sir, I don't know it, only what I hear talked by other parties in the bank.

Q. Did you see them in consultation?

A. No, sir; I might say right here, most of the time I was out of the city; I was not here looking very much of the time myself.

Q. What members of your board, if some more than others, controlled the policy of the bank?

A. I think Mr. Robinson controlled; that is my judgment. Col. Robinson had a municipal company account at the bank. I think Col. Robinson had a private account. The details I did not look

after very much myself; I wasn't there to do it; I didn't have my health to do it. I looked that over just as I did my own business; took a general survey. I did not scrutinize closely the account of Col. Robinson, or of the municipal company. By the municipal company I mean the Elmira Municipal Improvement Company, of which Col. Robinson was president. I knew by the report of the committee on finance the precise condition of the account of Col. Robinson personally and of the company of which he was president at my bank. I didn't look it over in detail myself, but they reported everything favorable.

I think my son Frederick was one of the committee of finance; I don't recall the others. I remember one overdraft; it was reported to myself as president of the bank by the comptroller at Washington several months before the bank failed. It was reported to me as Col. Robinson's individual overdraft. I had no knowledge of that overdraft until I obtained the knowledge from the Comptroller of the Currency. I knew from Mr. Bush that Col.

23 Robinson was discounting paper at the bank. Col. Robinson did not ask me to discount paper for him. I suppose he asked Mr. Bush. Such discounts as Col. Robinson obtained either for himself personally, or for the company of which he was president were obtained through Mr. Bush, the cashier. I called Mr. Bush's attention to this overdraft and then I asked Mr. Bush how Mr. Robinson's account was running; he said he had collaterals here in security for everything he was doing at the bank. I will say it was some time within six months of the failure of the bank was the time when I first obtained knowledge of this overdraft. I first mentioned the matter to Mr. Bush and he talked it up with Mr. Robinson, and the thing was entirely arranged satisfactory with the understanding that it would not occur again the second time. I said to Mr. Bush if that occurred again I would resign my office, and he assured me that it would not. It was arranged by Mr. Robinson, Mr. Bush and myself that that would be the last time there would be an overdraft; he paid it up promptly. I know it was paid up; but I don't know what way, I don't know it was paid actually by the use of money, only what Mr. Bush told me; he said it was arranged and paid. For anything that I know of my own knowledge, this overdraft, of which I obtained information through the Comptroller of the Currency, may have been made good by the use of notes furnished to the bank by Colonel Robinson instead of the payment of money. That may have been that way, I couldn't state.

Q. Are you able to state whether or not that particular overdraft was made good by the note of the defendant George M. Israel for \$17,000, together with other notes?

A. The overdraft was only four or five thousand dollars.

That is the only overdraft of which I ever had any knowledge. I don't know the particular manner in which that overdraft was made good. I have no knowledge whether or not this note of George M. Israel, dated May 4th, 1894, for \$17,000, or the note of John A. Bowers, or Frederick H. Mollenhauer or

Henry S. Roll, or one of them was used for that overdraft, only what Mr. Bush told me, that the overdraft was paid. He told me that it was paid. He didn't tell me by whom, or in what manner it had been paid. I didn't look at the books to ascertain; I didn't have the details. I didn't say anything to Colonel Robinson about resigning if that overdraft occurred again. Mr. Bush talked with the Colonel about that; not in my presence. I know that he talked with the Colonel, because the Colonel came up and showed me a statement of what he was worth afterwards, and said Mr. Bush talked with him. That statement, showing that he was worth a million and a quarter of dollars, restored my confidence in the Colonel; I had considerable confidence in Colonel Robinson and believed that he was worth a million and a quarter of dollars; that was on paper. I thought it was serious to have an overdraft on the bank, and I didn't like that myself. I told Mr. Bush I would not act as president of the bank if it occurred again. I had entire confidence in Mr. Robinson; I supposed he was a rich man.

The capital of the bank was \$200,000. Sixty or seventy thousand dollars' worth of stock stood in Col. Robinson's name. I can't name the precise amount. The bank did not permit Col. Robinson to have over \$20,000 discount. I didn't examine to see whether he was exceeding that line, I didn't have the details. The committee reported that he was not exceeding his line of discount; he was not allowed to. He had no right to. I was not there all the time. I know he had no right to. I did not know whether he was exceeding his line of discount or not. The line of discount  
25 which was permitted to the Elmira Municipal Improvement

Company was under \$20,000; nothing over. I had no knowledge whether or not that company exceeded its limit. To my knowledge Col. Robinson did not have a line of discount largely in excess of \$20,000; not to my knowledge. I don't know what he did when I was out of the city; he didn't exceed his line of discount when I was in the city; that is, of my knowledge. Probably he may have done that without my knowledge. It might have been possible for the matter to have been fixed up between him and Mr. Bush and I not know of it. I was down there every day I was in the city and looked over the books, that is, the balance-sheet. I understood that Mr. Bush was cashier and he ought to follow the directions of the directors. I knew he and Mr. Robinson were having things worked together some way or other. I suppose he followed the directions of the directors, not of Col. Robinson.

Q. Do you not, from the subsequent knowledge which you have obtained, now know that he did follow the directions of Col. Robinson?

A. It looks that way now."

Whereupon the counsel for plaintiff did then and there object to the admission of this answer, and insisted that the same be not allowed in evidence, for the reason that it was a conclusion of the witness arrived at from subsequent developments, and his honor,

the said judge, then and there sustained said objection and excluded said testimony.

Whereupon the counsel for the said defendant did then and there propose his aforesaid objection to the ruling of the said court, and prayed that his bill of exception might be sealed, and it was sealed accordingly.

26      Thereupon the witness testified further, as follows :

"Q. Then you say that it now appears, from the knowledge which you have subsequently obtained, that Col. Robinson dominated to a large extent the policy of the business done at that time ?

A. I know he had the policy of Mr. Bush, but I don't know as he had it to a large extent."

Whereupon the counsel for plaintiff did then and there object to the admission of the testimony, and insisted that the same be not allowed in evidence, for the reason that it was a conclusion of the witness arrived at from subsequent developments, and his honor, the said judge, then and there sustained said objection and excluded said testimony.

Whereupon the counsel for the said defendant did then and there propose his aforesaid objection to the ruling of the said court, and prayed that his bill of exception might be sealed, and it was sealed accordingly.

Thereupon the witness testified further, as follows :

"I have no recollection of any particular time that Col. Robinson obtained discounts at the bank. I know that he did obtain discounts. The course of business pursued by him in relation to the bank when he obtained discounts upon paper was usually to submit it to the board of directors. I don't remember any paper having been submitted to the board of directors. They handed it to the other directors; I wasn't here in the city. No, I am unable to state that any particular paper was submitted to the board of directors in my presence. I never had any knowledge of a note made by

George M. Israel, dated May 4th, 1893, for \$17,000, payable  
27      on demand to the order of the Elmira national bank. I

never had any knowledge of the paper of the other defendants in like suits whom we have already mentioned, viz: Bowers, Mollenhauer and Roll. If this note of the defendant in this suit, and the notes of the defendants in the other suits were ever submitted to the board of directors, it was done when I was not present.

Q. I understood you to say that the paper discounted by Col. Robinson was usually submitted to the board of directors; do you mean to say the paper was submitted to the board while in session?

A. No.

Q. In what way ?

A. They met at the bank and looked the matter over; not in full session.

Q. Who met ?

A. The finance committee.

Q. Who were they ?

A. I can't mention the names of that committee today.

Q. Then you don't mean to say that the paper was ever submitted to the board of directors while in session?

A. No.

Q. And you mean to be understood that it was submitted to the board of directors through the finance committee?

A. Yes, sir.

I had knowledge through Mr. Bush and my son of any of the paper which was discounted by Col. Robinson either on behalf of himself or of the company of which he was president. I heard of no particular paper through them, the gross amount was the main thing; I didn't have the details. Col. Robinson usually obtained discounts through Mr. Bush and the finance committee. I don't think that all of the paper discounted by Col. Robinson or at his request, or for his benefit, or for the benefit of the Elmira Municipal Improvement Company was submitted to the finance committee."

Being cross-examined by the attorney for the plaintiff, the witness testified, among other things, as follows:

"I think that the same finance committee served during 28 the whole of my term. I can't remember the date when I commenced in my office; I can look it up. It was less than two years. I was elected the second time. My absences during the period I held the office of president were from one week to three months. In all, half of my time was spent away from Elmira; six months in Elmira and six months out of Elmira. Every day while I was in town and my health was proper I managed the business of the bank just the same as I manage my own business. I look over the general business run of it. I did talk with the cashier. I attended every meeting of the board of directors when I was in the city. During all this period during which I served as president there was no paper discounted there to my knowledge and with my consent which was not valid bankable paper. I never knowingly allowed D. C. Robinson or the Municipal Improvement Company to obtain loans from the bank beyond the limit of discount that I have mentioned. I have not the letter I spoke of from the Comptroller of the Currency concerning an overdraft; I passed it into the bank to Mr. Bush; the bank has it, or ought to have it. That remained in the possession of the bank so far as I know. I have not seen it since. The notes found in the bank at the time of its failure were not submitted to the finance committee in my presence. I never had knowledge of any improper or irregular paper being presented to the committee. I went to New York the 1st of May, and came back the 19th of May. The failure was on the 23d of May. I got home just before."

Being further examined by the attorney for the defendant the witness testified, among other things, as follows:

"I never knew anything about that note (the note in suit) before today only what I have seen with Mr. Davis, the receiver; I never saw the note. Why I spoke of it not being good paper is that all

I know of it is recently; since it came into the receiver's hands; previous to that I knew nothing about it. I did not know anything about the paper given by John A. Bowers. I did not look over at all the individual notes which have been discounted at the bank. There was a committee for that business. And then I would talk with the committee. I manage my own personal business that way. I ask my partner what notes he has and how they stand; I never look at them, don't know whether I have a note or not. My information is that Mr. Bush, Col. Robinson and my son told me that everything was solid. I did not know anything about any notes in the bank by individually looking at the notes; I didn't go through the details. I couldn't tell you whose notes were in the bank. I got it from information from those whose duty it was to look after them, and if Col. Robinson and Mr. Bush were able to convince the finance committee that notes which Col. Robinson put in the bank for discount were good notes and the committee told me that they were good, I had to be satisfied. I do not know whether the finance committee had any knowledge of this note of defendant nor about the notes of the other defendants, Bowers, Roll and Mollenhauer; it was their duty to look after them; that is what they were nominated for. I do not know that these notes or any of them were ever submitted to the finance committee. I inspected the books personally every day I was home. I inspected the balance-sheet only. There was nothing in the balance-sheet that would show whose notes were in that bank. I was not in the habit of inspecting any books of the bank which would show the personnel of those who had discounts at the bank. My examination of the books was restricted to looking over the balance-sheet and talking with the officers of the bank. So far as my examination of the books was concerned it might have been possible for that balance-sheet to be so broad that any overdrafts 30 would be apparently covered by the means of notes rediscounted which were absolutely worthless. My information as to the amount of loans given to different customers of the bank was restricted to an examination of the balance-sheet and to talking with the officers of the bank, with Mr. Bush and my son and Mr. Wyckoff. I never asked Colonel Robinson what loans he had at the bank. I asked Mr. Bush very often the amount of the loans obtained by Colonel Robinson at the bank; I should say once in two or three months. Colonel Robinson always received loans within the limit, \$20,000. I am positive that I frequently asked, and that, except this one time of overdraft, the amount, either in his own account or in the account of the Elmira Municipal Improvement Company, was always within the limit. If the amount exceeded \$20,000 at any one time in favor of Colonel Robinson or the municipal company I did not know anything about it.

Q. You were deceived if the amount of the loan exceeded the limit?

A. As the boys say, that is about the size of it. I relied principally upon Mr. Bush, the cashier, concerning the individual liability to pay of those who made paper in the bank. I suppose that all

those notes were submitted to the finance committee. That was the order of business of the bank and the duty of the finance committee to pass upon. Paper was brought to the cashier and by him submitted to the finance committee, then when I talked with the finance committee and also with the cashier I had informed myself, so far as I considered it my duty concerning that paper, what they reported to me good, such and such, and the amount. I was satisfied; the directors were generally satisfied with Mr. Bush at that time. The finance committee acted with him. I had their confidence. I had no reason at all to suppose there was any paper there in the bank at the time the bank closed business that the  
31 finance committee had not passed upon. I thought every dollar of that was solvent until I saw some with Mr. Davis, as receiver, and talked with different parties about it.

Q. What reason have you now to suppose that there ever was any such paper?

A. From what I have seen with Mr. Davis, as receiver and with talking with different parties about it.

Q. From what you have heard and seen since the bank closed its doors, you are led to suppose there was such paper?

A. Yes, sir; that is the way it is.

Q. Then you are now satisfied, are you not, Mr. Richardson, that the course of business was not followed in all cases, and that paper was discounted at that bank without being submitted by the cashier to the finance committee?

A. Since the bank has passed into the receiver's hands it looks that way very much."

JOHN J. BUSH, who, being first duly sworn, testified, among other things, as follows:

"I reside in Elmira. I am a bank cashier. I was cashier of the Elmira national bank for over three years prior to its suspension. I was cashier of the bank in November, 1892, and from that time down to May 23d, 1893. I know Col. D. C. Robinson. He was a director of the bank while I was cashier. During that period we had a finance committee. The finance committee in November, 1892, had been elected in January, '92.

On motion of J. H. Clark the assessment committee was made up of L. H. Drake, E. L. Wyckoff in connection with the president and cashier of the bank. The examining committee, Judson H. Clark, J. B. Coykendall and Jackson Richardson. Those committees held offices until the appointment of their successors January 10th, 1893. The following became members of the loan committee for 1893, in addition to the officers of the bank: E. L. Wyckoff and L. H.  
32 Drake. That was the same membership of the finance, or, as they called it, the loan committee, as the year before. We called the finance committee the loan committee. In 1893 R. T. Peck, J. B. Coykendall and Frederick H. Richardson constituted the examining committee. I don't know as I can give you their duties in detail. There is a section numbered twenty-six of the by-laws that shows the examining committee (reads): 'Section

number twenty-six. There shall be appointed by the board of directors a committee of three, whose duty it shall be to exercise a supervision of the business of the bank, and to examine every three months the affairs of this bank, to count the cash and compare the assets and liabilities with the accounts of the general ledger, ascertain whether the accounts are correctly kept and the condition of the bank and correspondence therein, and whether the bank is in a sound and solvent condition, and to report to the board such changes and the manner of doing business, &c., as shall seem to be desirable; the result of which examination shall be reported to the board at the next meeting thereof.' That section is headed 'Examinations.' I should say, then, that it refers to the examining committee. Here is clause number nineteen (reads): 'There shall be a committee, to be known as the exchange committee, consisting of the president, cashier and directors appointed by the board every twelve months, to continue to act until their successors are appointed, to have power to discount, purchase bills, notes and other evidences of debt, and to buy and sell bills of exchange.' It is called the exchange committee there in that section. I don't know of the bank ever having an exchange committee. I haven't any knowledge excepting from the books, whether it was intended  
33 that the committee which I have termed the loan committee should be governed by this section which I have just read.

We had a very few customers that were borrowing to their limit on accommodation paper.

Mr. Robinson had some \$19,000 of his individual paper in the bank. If he had \$19,000 of his own paper at the bank, and the Bowers paper was used for his benefit, he would not exceed the amount to which he was entitled. He was entitled to \$20,000 on paper signed by himself.

Q. And there was no limit to the amount of discount he might obtain if the paper was signed by anybody else?

A. Yes, sir.

Q. So he could evade the rule and obtain unlimited discounts at the bank if he had paper signed by any one but himself?

A. He was limited by the board.

Q. So far as your rule was concerned?

A. As I understand it, they were to take paper of their customers for such amount as they saw fit.

Q. So no man was limited to \$20,000 discount except on his own paper?

A. He was limited to \$20,000 on his own paper.

Q. So it would be possible for a man to obtain \$100,000 by presenting paper signed by other people?

A. It would be possible for customers of the bank to present paper taken by them from their customers and discounted at our bank to such an amount as the bank officers saw fit to accommodate them.

I don't recollect the date when I first saw this paper of John A. Bowers. I don't remember who was present. My recollection would be, it was presented by Mr. Richardson. We had no such rule in our bank as to its being presented to the committee. The

committee took charge of the loans as they found them, and requested the cashier to increase them or diminish them as they saw fit. I have no recollection of what occurred when this note was presented for discount. I have no recollection as to whether or not it was presented to any other person or officer of the bank other than myself. Any paper that came into the Elmira national bank payable to my order as cashier I would endorse for collection. I don't recollect making any inquiries as to who John A. Bowers was. I said Colonel Robinson had a line of paper for \$19,000 in the bank, as to what date it was I don't know. I am unable to say how much discount he had obtained in the bank on his own paper at that time. I don't know of any books excepting those in possession of the receiver. Whether or not he has \$20,000 or less I would not be precluded under the practice of the bank from giving him credit for any other paper brought in by him which in my judgment was bankable paper. I never knew of John A. Bowers being a customer of the bank. I do not recollect ever hearing of him until the paper was presented. I have no recollection what inquiries I made about him. I will not swear I made any. I should say that I first heard of the defendant, George M. Israel, on May 4th, 1893. I first saw a note of \$17,000, dated May 4th, 1893, signed George M. Israel, when it was presented to me at our bank by Mr. Robinson. I don't recollect that it was presented to any one else. Mr. Robinson said he would like to have that with two others placed to his credit. My recollection is that the two others were the notes of Frederick H. Mollenhauer and Henry S. Roll. My recollection is that he said they were able to pay the notes. I have no recollection of having seen the gentlemen or knowing them prior to the presentation of the notes. I think they never had paper in the bank prior to that. I never made any inquiry as to the responsibility of these men from anybody else than Colonel Robinson.

On the night of May 3d he (Col. Robinson) closed with an overdraft of \$35,400.60. At the close of business on the night of 35 May 2d his account showed an overdraft of \$70,894.35. At the close of business May 1st, overdraft of \$64,304. Close of business April 28, overdraft \$89,505.55. \$62,314 on April 27. April 25th, \$137,314.00. April 24, \$63,214.30. 23d, \$38,594.31. 22d, \$47,591.53. 20th, the next business day, \$16,789.94. 19th, close of business, \$20,707.69. 18th, credit of \$5,423.46; the next day, \$7,876.14 overdraft. 16th, \$52,876.14 overdraft. \$19,376.14 overdraft at close of business on April 14th. At the close of business 13th, \$52,876.14 overdraft. At the close of business the 12th, \$29,829.04 overdraft. April 11th, \$36,881.80; the 10th, \$2,996.00; close of business on the 9th, \$6,722.18; on the 7th, \$4,792.82 credit; \$52,718 overdraft on the 6th. Close of the 5th, \$13,046.31 overdraft; close of the 4th, \$31,426.31 overdraft. April 3d, \$24,410.81 overdraft; April 2d, \$20,210.81; March 31st, \$37,492.68; March 30th, \$73,592.68; the next day, \$77,567.17; March 28th, \$98,512.23; 27th, \$79,481.98; 26th, \$60,677.39; 24th, \$45,677.39; 23d, \$31,796.31; 22d, \$40,781.39; 21st, \$42,781.39; 20th, \$25,281.39; 19th, \$56,494.37;

18th, \$55,958.87; 16th, \$23,283.03; 15th, \$28,315.51; 14th, \$29,105.34; 13th, \$15,510.09. I would like to say in connection with that overdraft that Mr. Robinson notified us that his account was not overdrawn according to his books, and that we had charged some items to his account that were not properly entered there, and he wanted us to balance up his book. We told him at any time he would like to have his book balanced up we would. I don't think the officers and directors of the bank would allow that overdraft to continue the weeks it did unless they had some grounds for the belief that there was an error in books that would show him with such an overdraft. I do not know what grounds they had for that belief. We couldn't get his books; we balanced our own books. There

36 was an item that has been shown since, whose amount I don't know, that was a foundation for such a claim as this.

I wouldn't say that I believed that such an amount as \$137,314 overdraft on April 25th, 1893, could have been credited to one account and drawn upon another by error. I simply said that much as I considered it my duty to say. I think Frederick H. Richardson, of the examining committee, knew of that overdraft on the books. I wouldn't swear I knew any of the others who did; my impression is that Mr. Wyckoff was aware of it; I wouldn't say that he was. There certainly was an overdraft that showed there weeks and weeks. At the close of business May 3d there was an overdraft of \$35,400.60.

Q. And the next day you permitted him to discount paper about which you knew nothing, the makers of which you had never heard of, amounting to an aggregate of \$54,000, did you?

A. Yes, sir.

Q. And you did that upon your confidence of the responsibility of Colonel Robinson alone, did you not?

A. No, sir.

Q. Upon whose responsibility did you depend?

A. I considered the responsibility of the party, I. B. Newcombe & Co.

Q. Are I. B. Newcombe & Company parties to this paper, any of it?

A. No, but I saw a letter in which Mr. Robinson said he had received that paper from those people.

Q. Let me see that letter.

A. Mr. Robinson has it.

By Mr. SICARD:

Q. Was that the letter that was photographed?

A. Yes, sir.

By Mr. SMITH:

Q. Where is the photograph of it?

A. I haven't got it.

Q. Can you get it?

A. I presume I can get it.

37 By Mr. SICARD:

Q. Did you read the letter?

A. I don't remember but seeing the head of it.

Q. Did you read it at any time?

A. Yes, sir.

This is taken outside of the stipulation, and waiving all objections to it.

By Mr. SMITH:

Q. State the contents of that letter.

A. I wouldn't want to state the contents of a letter I hadn't seen in two years and a half.

Q. State your best recollection of that letter.

A. To my best recollection the letter recited that the enclosed notes were sent to him, and that it was signed by Mr. Israel; the form of it I would not be able to say.

Q. The only thing that connected I. B. Newcombe & Company with this was the fact that the letter was written on their letter-head?

A. Perhaps that was it.

Q. You are sure the letter wasn't signed by anybody else but the defendant George W. Israel?

A. I wouldn't swear it was signed by anybody else.

Q. Do you recollect the date of this letter?

A. My impression is it was May 3d, 1893.

Q. To whom was it addressed?

A. My recollection of it is it was addressed to Col. D. C. Robinson.

Q. Did he say for what purpose he showed you that letter?

A. I don't recollect as he did.

Q. Did you understand at the time the object he had in showing you that letter?

A. I didn't connect any special object with it.

Q. When did he show you the letter?

A. When he gave me the notes.

Q. On the 4th day of May, 1893?

A. Yes, sir.

Q. Was the letter anything more than a letter of advice stating that the notes were enclosed?

38 A. I have given you as nearly as I can recollect the contents of the letter.

Q. Just answer my question.

A. I couldn't say.

Q. Didn't the letter contain any statement that the parties making the notes were solvent?

A. I couldn't swear as to that.

Q. Can't you swear whether or not there was anything of that kind in the letter?

A. I have given you my recollection of the letter that they enclosed—

Q. Who enclosed, that the writer enclosed, you mean?

A. I wouldn't say as to the starting of the letter.

Q. Do you recollect that the letter contained any statement as to the solvency of the makers of these notes?

A. I wouldn't swear it contained any such statement.

Q. Did it contain any statement that these notes were made by the members of the firm of I. B. Newcombe & Company?

A. I submit that you get the letter.

Q. Do you recollect that it contained any such statement?

A. I have no recollection of the contents of that letter beyond what I have given you.

Q. Was there anything in that letter to indicate that the letter was written by a member of the firm instead of the typewriter in the office, as a matter of fact?

A. I was led to believe that that letter was in connection with business Col. Robinson was doing with I. B. Newcombe & Company, and had been doing.

Q. If you were led to believe that, let us know just how you were led to believe that.

A. I don't know as I can tell you just exactly how.

Q. I think it is quite important.

A. I knew Col. Robinson and I. B. Newcombe had had dealings in the past in the transfer of this property, and knew they were interested with one another, and the fact that the paper came up from their office perhaps led me to believe that.

39 Q. And that may have been the sole ground you had for any such belief?

A. I couldn't say that I had any specific ground for saying I knew I. B. Newcombe was interested in that.

Q. And it may have been that the sole reason you had for believing that was that I. B. Newcombe at some time anterior to that had been engaged with some business of Mr. Robinson's?

A. I knew their relations immediately prior to that time had been close.

Q. What business relations had they had immediately before this time?

A. In connection with this property?

Q. What business relations had they had?

A. I suppose, technically speaking, that between broker and client.

Q. Had you known of any business transactions between Col. Robinson and I. B. Newcombe & Co. for many months?

A. I guess they had no other transactions for some time.

Q. For a period of some months?

A. I wouldn't say months.

Q. What other persons in the custom of doing business in your bank would you have permitted to bring in paper made by persons of whom you had never heard, and would have given the amount of credit to that person which you gave in this case, viz., \$54,000?

A. It had been the custom of our bank to take such paper as its customers offered. The officers and directors of the bank when they saw fit to ask the cashier to reduce a customer's line of discount they

notified him to do so, and that cashier did immediately reduce such line.

Q. And is it a fact that they regarded Colonel Robinson in a different light from some of the customers of the bank from the fact that he was a director of the bank?

A. No, sir; if my superiors had ordered me to reduce Colonel Robinson's line I should have done so.

Q. What was Mr. Robinson's line?

40 A. My instructions from my superiors were to take care of Colonel Robinson's account.

Q. What do you mean by that?

A. That he was entitled to such lines of discount as would be necessary to conduct his business here connected with these properties.

Q. Then he had an unlimited amount of discount?

A. No, the loan committee had the power to cut him down. He did not have an unlimited amount of discount, the loan committee had the power to cut him down. There had never been any amount named to any of our customers. I don't agree with you that this line of discount was unlimited. The judgment of my superior officers was the limit. In this case I did not act on my own judgment. I did in this case as in all others. I would not be able to say to what amount I would have taken paper of this kind presented by Colonel Robinson. If I had suspected that a paper was presented by an irresponsible typewriter, I should have notified my superiors; I should have immediately found some of my officers to consult them.

Q. To what amount would you have taken paper that day presented by Colonel Robinson of this character, knowing just as much and no more about this paper than you did?

A. I never had been required to make in my mind an amount that I would take or would not take.

Q. You would have taken \$100,000 just as rapidly, would you not?

A. I don't say that I would.

Q. You don't say that you would not?

A. I don't know, Mr. Smith; I never was presented with that amount of paper.

Q. You may state whether or not that you were influenced to some degree by the fact that there was an overdraft staring you in the face of over \$35,000 by Col. Robinson.

41 A. No, sir; I don't know as I knew there was an overdraft.

Q. You had no suspicion it was any such amount as that?

A. I wouldn't say I hadn't any suspicion, because I knew it was a large amount.

Q. You did know he had a large overdraft of a large amount?

A. From time to time I knew he would overdraw, and he notified us there was an error in his account.

Q. Notwithstanding that overdraft, you took the paper, credited the paper without question?

A. I had no authority to refuse the paper, sir.

My superior officers were the president, vice-president and the ten directors outside of them. No, I don't say that I had instructions from the president, vice-president and the ten directors to let Col. Robinson have such accommodations as he desired at the bank. Mr. Richardson, my president, stated to me that Mr. Robinson was entitled to what accommodations he needed for the carrying out of his business, that he had shown him that he was a very wealthy man. I think in our committee meetings there was more or less discussion of those matters. On January our various committees examined every note that Mr. Robinson had put in the bank; I think they made a report to the department that such loans were satisfactory. I didn't do anything in regard to this loan or any other pertaining to Colonel Robinson different from what I had done before for him or any other man as a customer in the bank. I did not ask Colonel Robinson whether George M. Israel was a millionaire. I did not ask him whether Frederick H. Mollenhauer was a man of affairs and property. I have no recollection of asking Mr. Robinson as to the responsibility of that paper. I knew Colonel Robinson was a director in our bank at the time I took this paper. My instructions were such that I would not have a right to refuse to take the paper of our directors to that amount. If a man were a director and presented paper to that amount I would have no more right to take it than if he were any other customer. I would not take this amount from any person if I knew he was not responsible.

42 I don't know of any other customers on our books who had ever presented paper to us the makers of which I did not know, without any signature at all except his own and without any endorser. If any of our customers who were doing business and required that line of discount and they brought us paper, it would make no difference. There never was any other man who came to our bank with paper of \$54,000 made by unknown makers, and I would not know until such a question came up to me how I would decide it. In several other cases we permitted our customers to bring in paper made by persons we didn't know and who did not endorse that paper themselves. We presented these notes to the makers at New York. If the makers hadn't paid them I should look to Col. Robinson. I believed the makers would pay them, and I should have looked to Col. Robinson if they had not, although he didn't endorse them, and although we didn't have any legal claim on him, we should look to him to pay the notes."

DAVID C. ROBINSON, who, being first duly sworn, testified, among other things, as follows:

"I reside in Elmira. I am a lawyer. My connection with the Elmira Municipal Improvement Company commenced in April, 1892, and lasted until about May 23d, 1893. During the latter part of this period I was also a director of the Elmira national bank, and was using large sums of money for the organization of the Elmira Municipal Improvement Co.; the adjustment of its properties and the purchase of additional properties for it, the purchase of its

43 securities; and the retirement of its obligations, besides large building operations. I kept an account at the Elmira national bank. There was a dispute between me and the bank, dating from about August 1, 1892, as to whether or not my account was overdrawn.

Q. State briefly the dispute between the parties.

A. The cashier had said to me there was an overdraft. I said I didn't see—I am giving the substance—I didn't see exactly how that could be, that we must get together and balance the account, which had not been balanced for some weeks then, and he said, and I agreed with him, that that would be an all night's job when we got at it, the checks being very numerous, and in the course of my duties as mayor of the city, president of the Municipal Improvement Company, and in the practice of my profession, and the management of a large number of estates and trusts, I was so busy that I hadn't time to get at the ground of difference. I said I would endeavor to keep the account good until we could adjust the errors. That is practically the talk.

Q. Did the cashier at that time advise you of the amount that he claimed your account was overdrawn?

A. Once or twice I think he did, but I think not at any time exactly; I think his expression was, 'We want so much to make our figures good.'

Q. What did he say he wanted?

A. About so much deposited.

Q. Did he say any particular amount?

A. No; I think not; I think he said, 'We need so much to make your account good.'

Q. But say about May 4th, 1893, what did he say he wanted to make the account good?

A. I think that some little time prior to that there had been a discussion as to whether the account was or was not overdrawn, and at that time he had a pretty large figure, some forty or fifty thousand dollars as the figures of their overdraft which I couldn't understand, and I told him I would send him in some cash and 44 securities, or both and keep it along until we could get at it and straighten the account up.

Q. Then when it was claimed by the cashier that there was an overdraft against you that you obtained the paper of the defendant George M. Israel, was it not?

A. Yes, sir; it was about that time.

Q. And also the paper of Frederick H. Mollenhauer, Henry S. Roll, and John A. Bowers?

A. Yes, sir.

These notes were used at the Elmira national bank, and the proceeds, I understood, were credited to my account, at the time it was claimed by the bank there was an overdraft. I don't know whether the defendant or any of the others received any consideration at the time I obtained their paper; they didn't receive anything directly from me. The amount of other notes wiped out the overdraft, and made a balance. I am not stating positively, because I don't re-

member whether the amount of the overdraft was spoken of to me or not. I executed a paper purporting to be a guaranty of those notes and some other paper, long afterwards. (Paper shown witness.) That is the paper."

Whereupon the attorney for the defendant offered the said paper, and read the same in evidence as follows:

"For value received I hereby guaranty the payment and collection of the following-named promissory notes to the Elmira national bank or its assigns: The Cortland Corset Manufacturing Company, dated October 31, 1892, due five months after date, \$2,500. Note, same maker, same date, due in three months, \$4,000.

D. C. ROBINSON."

"And in like manner guaranty the following, to wit: Note to John M. Bowers, dated March 14, 1893, \$18,000, at four months. Note of George M. Israel, dated May 4, 1893, \$17,000, on demand. Note of F. A. Mollenhauer, dated May 4, 1893, \$18,000, on demand. Note of H. S. Roll, dated May 4, 1893, \$19,000, on demand. Note of J. M. Robinson, Sons & Company, May 4, 1893, \$12,250.

Dated Elmira, May 4, 1893.

D. C. ROBINSON."

"This guaranty was executed about May 20, 1893. The bank passed into the hands of the plaintiff, as receiver, about May 26, 1893. The aggregate amount of the so called Robinson paper in the bank was about \$300,000, and of the so-called Bush paper was about \$107,000."

Q. Something was said about what was called the Robinson paper while you were under examination, and about the Bush paper. What did you mean by Robinson paper?

A. I mean the paper that the receiver and the comptroller called Robinson paper.

Q. That won't enlighten the court when we get before the court. What was the character of the paper; what made it Robinson paper; paper that had your name on?

A. That is just what I don't mean. I mean the Municipal Improvement Company paper, although not endorsed by me, was called Robinson paper; I mean the Elmira Water Works Company paper, although not endorsed by me was called Robinson paper; I mean the paper of the Elmira Gas & Illuminating paper was called the Robinson paper; I mean the paper of the Cortland Corset Manufacturing Company was called Robinson paper; I mean the paper of these gentlemen, Israel and others, was called Robinson paper, and I mean to say that an alleged overdraft was called Robinson paper; I mean to say that a draft on the Chase national bank of twelve thousand dollars was called Robinson paper.

Q. And all those were so called because they were matters 46 in which you personally were either endorser or guarantor, or had received the money directly or indirectly?

A. I don't know what the reason was; I only know they classified it, and called certain paper Robinson paper.

Q. What was the Bush paper?

A. I couldn't begin to tell you what that was; I don't know. The notes made by members of his family which had come to the bank through him, and which were classified in that way.

WILLIAM B. EDSON, who, being first duly sworn, testified, among things, as follows:

"I reside in Elmira; my occupation is book-keeper in the Elmira City bank, of which Mr. J. J. Bush is the cashier. I was employed as book-keeper in the Elmira national bank from 1889 or 1890 until the closing of the bank. The writing in the body of the note for \$17,000 made by the defendant, the note for \$19,000 made by Henry S. Roll and the note for \$18,000 made by Frederick H. Mollenhauer is in the handwriting of more than one person. I recognize the writing designating the place where the notes are made payable, being the words "Elmira national bank," as the handwriting of E. A. P. Smith who was assistant cashier of the bank at that time. I first saw these notes during the day of May 4, 1893, in the basket that was supposed to contain notes, discounts, and all papers for the day's business and for the ledger, and Mr. Bush left instructions that those notes be discounted and placed to Mr. Robinson's account on that day. Mr. Bush went away on the night of the fourth and therefore they were placed to Mr. Robinson's credit the next day, the 5th. I had already entered them upon the books as of May 5th and I erased those entries, and substituted therefore

May 4th by the direction of Mr. Bush. The order was  
47 given to me by Mr. Smith, who received orders from Mr.

Bush in New York by telephone. There was an overdraft of \$35,000 against Mr. Robinson upon the books of the bank, on the morning of May 4th. There were items coming through the exchanges that amounted to about \$73,000, and there was a deposit made of \$33,000 to make the overdraft good. These were to take up the items that came through the exchanges. I think that was the way of it. His account would have been overdrawn that night about \$50,000 if it had not been for the entry on the books of the proceeds of these notes. Colonel Robinson was in New York at the time Mr. Bush telephoned from New York to the bank. On May 4th, 1893, Colonel Robinson's personal notes amounted to \$19,000, and the notes upon which he was endorser \$34,000. I do not include in these amounts the paper of the defendants in these suits or the amount of the overdraft."

And thereupon the defendant rested his case.

Whereupon the plaintiff's counsel asked the court to direct a verdict in favor of the plaintiff. The attorney for the defendant objected to a direction of a verdict in favor of the plaintiff, and asked the court to submit to the jury the question, whether upon the evidence in the case the note given by the defendant had been diverted from the purpose for which it was obtained from and given by the de-

fendant, which the court refused, and the attorney for the defendant duly excepted.

The attorney for the defendant also requested the court to submit to the jury the question whether under all the circumstances proved in the case the Elmira national bank took the said note in good faith, relying upon the contract of the defendant to pay the same; and also the question whether or not said bank had notice or was put upon its inquiry as to whether there was any consideration passing to the defendant from either said Robinson or the payee named in said note, the said bank, and if put upon its inquiry whether said bank would have ascertained the fact that there was no consideration for the said note and that it could not recover upon the same. The court denied each of the said requests so made on behalf of the defendant, and the attorney for the defendant duly excepted.

48 The defendant's attorney thereupon asked to have submitted to the jury the question whether in view of the erasure of the entry of the said notes upon the books of the bank first made on May 5, 1893, and the entry of the same as of May 4, 1893, by the order of its cashier the said bank acted in good faith, without notice of any infirmity in said note, and became a *bona fide* holder thereof for value, and whether the fact of such erasure is not a circumstance tending to show the guilty complicity of the said cashier with the said Robinson in taking the paper under such circumstances as would point to his knowledge of the fact that there was no consideration passing to the maker of the said note from the payee, the said bank, or from said Robinson.

The court denied each of the said requests so made on behalf of the defendant, and the attorney for the defendant duly excepted.

Whereupon the court directed a verdict in favor of the plaintiff and against the defendant and addressed the jury as follows:

"GENTLEMEN OF THE JURY: I cannot see anything in the facts of this case which legally take it out of the ordinary rule with regard to the liability of the maker upon an accommodation note. As I look at it now I cannot find any material question of fact to submit to you, and you are therefore directed to render a verdict for the full amount of \$17,000 and interest, which counsel can agree upon;" to which direction of a verdict in favor of the plaintiff the attorney for the defendant duly excepted.

49 It was agreed by the attorneys for the respective parties that interest should run upon the note in suit from the date of the beginning of the action.

The jury thereupon rendered a verdict in favor of the plaintiff and against the defendant in the sum of \$17,000, with interest from the date of the beginning of the action, to wit, the 13th day of August, 1895.

The attorney for the defendant, who is also the attorney for the defendants in each of the two actions now pending, wherein the said receiver is plaintiff and Frederick H. Mollenhauer and John A. Bowers are defendants, respectively, agreed in open court that should the appellate court sustain the decision of the court in this action

he will allow judgment to be entered in said action without proceeding with the trial thereof.

And forasmuch as the facts aforesaid, and the decisions of the court thereon, do not appear of record, the defendant prays that this his bill of exceptions may be allowed, and the same is allowed and ordered to be filed on February 7th, 1896, at the term during which the verdict was rendered.

N. SHIPMAN,  
*Circuit Judge.*

It is hereby stipulated that the foregoing bill of exceptions be allowed and filed.

BISSELL, SICARD, BISSELL & CAREY,  
*Attorneys for Plaintiff.*  
FRANK SULLIVAN SMITH,  
*Attorney for Defendant.*

Endorsed: U. S. circuit court, southern dist. of New York. Charles Davis, as receiver of the Elmira national bank, plaintiff, against George M. Israel, defendant. Bill of exceptions. Frank Sullivan Smith, attorney for defendant, No. 54 Wall street, New York, N. Y. U. S. circuit court. Filed Feb. 7, 1896. John A. Shields, clerk.

50 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

|   |                   |
|---|-------------------|
| CHARLES J. DAVIS, as Receiver of the Elmira Na.<br>tional Bank, | } Bond for Costs. |
| vs.<br>GEORGE M. ISRAEL.  |                   |

Know all men by these presents that we, George M. Israel, as principal, and Frank Sullivan Smith and John Byrne as sureties, are held and firmly bound unto the above-named Charles Davis, as receiver of the Elmira national bank, in the sum of two hundred and fifty dollars, to be paid to the said Charles Davis, as receiver, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the eighth day of February, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas the above-named George M. Israel has prosecuted an appeal to the circuit court of appeals of the United States for the second circuit to reverse the judgment rendered in the above-entitled suit, by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named George M. Israel shall prosecute such appeal to effect

51 and answer all costs, if he shall fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

GEO. M. ISRAEL.

FRANK SULLIVAN SMITH.

JOHN BYRNE.

[SEAL.]

[SEAL.]

[SEAL.]

Sealed and delivered and taken and acknowledged this eighth day of February, 1896, before me.

FREDERIC H. RIDGWAY,

[SEAL.] Notary Public (100), City and County of New York.

UNITED STATES OF AMERICA,  
Southern District of New York, }  
{ ss:

Frank Sullivan Smith and John Byrne, being duly sworn, depose and say, each for himself, that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

FRANK SULLIVAN SMITH.  
JOHN BYRNE.

Sworn to this eighth day of February, 1896, before me.

FREDERIC H. RIDGWAY,

[SEAL.] Notary Public (100), City and County of New York.

Endorsed: U. S. circuit court, southern district of New York. Charles Davis, as receiver of the Elmira national bank, vs. George M. Israel. Bond for damages and costs on writ of error. Approved Feb. 10, 1896. E. H. Lacombe, U. S. circuit judge. U. S. circuit court. Filed Feb. 10, 1896. John A. Shields, clerk.

52 United States Circuit Court, Southern District of New York.

CHARLES DAVIS, as Receiver of the Elmira National Bank, Plaintiff,  
against  
GEORGE M. ISRAEL, Defendant.

*Assignment of Errors.*

And now comes the said George M. Israel by Frank Sullivan Smith, his attorney, and says, that in the record and proceedings in the above-entitled cause there is manifest error in this, to wit:

I.

That the circuit court of the United States for the southern district of New York erred in refusing to submit to the jury in accordance with the request of the attorney for the defendant, the question whether upon the evidence in the case the said note given by the said defendant had been diverted from the purpose for which it was obtained, to wit, to enable the said D. C. Robinson to obtain money

from the proceeds of said note with others given at the same time and in the same manner wherewith to build a power-house at Elmira, N. Y., for the use of the corporation of which said Robinson was the president, and in which the firm by which the defendant was employed were interested, and said note was used for a different purpose, to wit, to apparently make good or cover up  
53 an overdraft of the said Robinson of long standing at the said Elmira national bank.

## II.

That said court erred in refusing to submit to the jury, in accordance with the request of the attorney for the defendant, the question whether under all the circumstances proved in the case the Elmira national bank took the said note in good faith, relying upon the contract of the defendant to pay the same.

## III.

That said court erred in refusing to submit to the jury, in accordance with the request of the attorney for the defendant, the question whether or not said bank had notice or was put upon its inquiry as to whether there was any consideration passing to the defendant from either said Robinson or the payee named in said note, the said bank; and if put upon its inquiry, whether said bank would have ascertained the fact that there was no consideration for said note, and that it could not recover upon the same.

## IV.

That said court erred in refusing to submit to the jury, in accordance with the request of the attorney for the defendant, the question whether, in view of the erasure of the entry of the said notes upon the books of the bank first made May 5th, 1893, and the entry of the same as of May 4, 1893, by the order of its cashier, the said bank acted in good faith, without notice of any infirmitiy in said note and became a *bona fide* holder thereof for value.

## V.

54 That said court erred in refusing to submit to the jury, in accordance with the request of the attorney for the defendant, the question whether the said fact of such erasure was not a circumstance tending to show the guilty complicity of the said cashier with the said Robinson in taking the said note under such circumstances as would point to his knowledge of the fact that there was no consideration passing to the maker of said note from the payee, the said bank, or from said Robinson.

## VI.

That said court erred in instructing as follows: "Gentlemen of the jury, I cannot see anything in the facts of this case which legally take it out of the ordinary rule with regard to the liability of the

maker upon an accommodation note. As I look at it now I cannot find any material question of fact to submit to you, and you are therefore directed to render a verdict for the full amount of \$17,000, and interest, which counsel can agree upon."

## VII.

That said court erred in directing a verdict in favor of the plaintiff and against the defendant for the amount of said note.

Wherefore the said defendant George M. Israel prays that the judgment of the said circuit court of the United States for the southern district of New York be reversed.

Dated February 7th, 1896.

FRANK SULLIVAN SMITH,

*Attorney for Plaintiff in Error,  
No. 54 Wall Street, New York, N. Y.*

(Endorsed:) U. S. circuit court, southern district of New York.

Charles Davis as receiver of The Elmira National Bank,  
55 plaintiff, against George M. Israel, defendant. Assignment  
of errors. Frank Sullivan Smith, attorney for defendant,  
No. 54 Wall street, New York, N. Y. U. S. circuit court. Filed  
Feb. 10, 1896. John A. Shields, clerk.

55 UNITED STATES OF AMERICA, ss:

To Charles Davis, as receiver of the Elmira national bank, Greeting:

You are hereby cited and admonished to be and appear at a stated term of the circuit court of appeals for the second circuit, to be holden at the United States court and post-office building, in the city of New York, on the 10th day of March, eighteen hundred and ninety-six, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein George M. Israel is plaintiff in error, and Charles Davis, as receiver of the Elmira national bank, is defendant in error, to show cause if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this 10th day of February, in the year of our Lord one thousand eight hundred and ninety-six.

E. H. LACOMBE,  
*Circuit Judge.*

(Endorsed:) U. S. circuit court, southern dist. of New York.  
George M. Israel, plaintiff in error, against Charles Davis, as re-  
ceiver of the Elmira national bank, defendant in error.  
56 Citation on appeal. Frank Sullivan Smith, attorney for  
plaintiff in error, No. 54 Wall St., New York, N. Y. Due  
service of a copy of the within citation on appeal is hereby ad-  
mitted, dated February 11th, 1896. Bissell, Sicard, Bissell & Carey,  
att'y's for def't in error. U. S. circuit court. Filed Feb. 14, 1896.  
John A. Shields, clerk.

## 56a United States Circuit Court of Appeals for the Second Circuit.

GEORGE M. ISRAEL, Plaintiff in Error,  
*against*  
 CHARLES DAVIS, as Receiver of the Elmira National Bank, De- }  
 fendant in Error.

It is hereby stipulated and agreed by and between the attorneys for the respective parties in the above entitled cause that Charles F. Gale, receiver of the Elmira national bank, be substituted as defendant in error in said cause in the place and stead of Charles Davis, deceased, and that an order to that effect may be entered by the solicitor for either party upon this stipulation and consent without notice.

Dated Aug. 5, 1896.

FRANK SULLIVAN SMITH,  
*Attorney for Plaintiff in Error.*  
 BISSELL, SICARD, BISSELL &  
 CAREY,  
*Attorneys for Defendant in Error.*

Ordered accordingly.  
 E. H. L.

(Endorsed:) U. S. circuit court of appeals for the second circuit. George M. Israel, plaintiff in error, against Charles Davis, as receiver of the Elmira national bank, defendant in error. Stipulation and order. Frank Sullivan Smith, attorney for plaintiff in error, 54 Wall street, New York, N. Y. United States circuit court of appeals, second circuit. Filed Aug. 10, 1896. James C. Reed, clerk.

57 United States Circuit Court of Appeals for the Second Circuit,  
 October Term, 1896.

Submitted November 20, 1896; decided December 8, 1896.

GEORGE M. ISRAEL, Plaintiff in Error,  
*vs.*  
 CHARLES F. GALE, as Receiver of the Elmira National } No. 23.  
 Bank, Defendant in Error.

In error to the circuit court of the United States for the southern district of New York.

Before Judges Wallace and Lacombe.

WALLACE, *Circuit Judge*:

This is a writ of error by the defendant in the court below to review a judgment for the plaintiff entered upon a verdict directed by the court. The assignments of error raise the question whether the trial judge was justified in withdrawing the case from the consideration of the jury and instructing them to return a verdict against the defendant.

The action was brought by the plaintiff as the receiver of the

Elmira national bank to recover the amount of a promissory note for \$17,000, dated May 4, 1893, payable to the order of the bank, and signed by the defendant. The defense was that the note was made and delivered by the defendant to one Robinson without consideration, and that the bank had notice of the facts and never became a holder for value. The defendant further insisted upon the trial, although no such defense was alleged in the answer, that the  
58 note was delivered to Robinson for a special use and was wrongfully diverted by him from the purpose for which it was given.

Upon the trial the evidence was that on or about the day of the date of the note Robinson applied to the defendant, who was a stenographer and typewriter in the employ of the firm of Newcombe & Co. of New York city, and to several of the clerks of that firm, to lend him their names upon accommodation paper to be used by him with the Elmira National bank. He stated that he had exceeded his line of discount at the bank; that he was building a power-house at Elmira and needed some money for that purpose; and that if the defendant and the clerks would give him their notes he would take care of them, and it would enable him to effect his object. Thereupon the defendant signed and delivered to Robinson the note in suit, and the clerks respectively signed and delivered to Robinson their notes as requested by him. Robinson forwarded all the notes to the bank, and the day after receiving them the bank credited him with the aggregate face amount thereof, being \$54,000. Robinson was a director of the bank, and his account was and had long been heavily overdrawn. When credited with the amount of the notes his account was overdrawn at least \$50,000. Neither the defendant, nor any of the clerks from whom Robinson obtained the accommodation paper, had any financial interest in Robinson's building or other business affairs. They supposed him to be a man of large means who could and would see that the notes were paid without recourse to them.

Assuming that there was enough in the circumstances attending the reception and discount of the paper by the bank to charge it with notice that the note in suit was an accommodation note made for the benefit of Robinson, and without other consideration, the bank was a purchaser for value and entitled to enforce it against the maker. That it was a purchaser for value, although it did not advance any money upon the note, but merely gave Robinson credit for the amount upon his precedent indebtedness, is entirely clear upon the authorities which prevail in this court. *Swift*  
59 *vs. Tyson* (16 Peters, 1); *National Bank of the Republic vs. Brooklyn City Railway Co.* (14 Blatch., 242), affirmed 102 U. S., 14.

Accommodation paper is put into circulation for the purpose of giving credit to the party for whose benefit it is intended, and although he cannot maintain an action upon it against the accommodation maker or endorser, and would be defeated because of want of consideration, a purchaser can do so who acquires it while still current and gives the credit it was intended to promote, al-

though with knowledge of its original character. *Jewett vs. Holden* (1 Woods, 530); *Smith vs. Knox* (3 Esp. R., 46). As to the purchaser it is in effect a letter of credit, and when he gives credit upon it a sufficient consideration arises to support the promise of the accommodation maker or endorser. *Violett vs. Tatton* (5 Cranch, 142). "Accommodation paper is daily placed in the market for discount or sale, and the endorsee or purchaser who knows that a bill still current was drawn, made, accepted or endorsed without consideration is as much entitled to recover as if he had been ignorant of the fact." 1 *Daniel, Negotiable Instruments, sec.* 790.

The note having been made for the purpose of being discounted by the Elmira national bank, and having been used for that purpose by Robinson, effected the substantial object for which it was designed. Robinson did not promise the defendant, or the makers of the other notes, to use the avails in any particular way; and as none of the makers had the remotest concern in the building of the power-house, or in his disposition of the avails, his statement of the reasons which led him to apply for aid and of the use for which he wanted it, was not of material matter, and could not have been in a legal sense an inducement for the accommodation. The case is quite analogous to *Mohawk Bank vs. Corey* (1 Hill, 513). The evidence was wholly insufficient to charge Robinson with a fraudulent diversion of the paper, and the trial judge correctly refused to submit any issue involving that question to the jury.

60 We find no error in the rulings at the trial and conclude that the judgment should be affirmed.

*Frank S. Smith*, for the plaintiff in error.  
*Martin Cary*, for the defendant in error.

61 At a stated term of the United States circuit court of appeals for the second circuit, held at the United States court and post-office building, in the city of New York, on the 23rd day of March, 1897.

Present: Hon. William J. Wallace and Hon. E. Henry Lacombe, justices.

GEORGE M. ISRAEL, Plaintiff in Error,

vs.

CHARLES F. GALE, as Receiver of the Elmira National Bank (Substituted for Charles Davis, as Receiver, etc.), Defendant in Error.

A judgment having been duly entered in the above-entitled action in the circuit court of the United States for the southern district of New York, in favor of the defendant in error and against the plaintiff in error, on the 4th day of February, 1896, for the sum of \$17,555.63, and a bill of exceptions having been duly granted and filed in the office of the clerk of said court on the 7th day of February, 1896, and an assignment of errors filed in said clerk's office on the 10th day of February, 1896, and a writ of error granted and citation on appeal issued, and the record and proceedings in said circuit court

having been duly certified to the justices of this court and a hearing thereon duly had on the 20th day of November, 1896, and, after hearing Frank Sullivan Smith, attorney for the plaintiff in error, and Martin Carey, of counsel for the defendant in error, and due deliberation having been had:

62 Now, on motion of Bissell, Sicard, Bissell & Carey, attorneys for the defendant in error,

It is ordered that said judgment be affirmed, and the clerk of this court is hereby directed to issue the mandate of this court to said circuit court of the United States for the southern district of New York accordingly.

E. H. L.

The plaintiff in error hereby waives notice of motion for the issuing of a mandate herein, and hereby consents to the form of the annexed order.

Dated New York, March 17, 1898.

FRANK SULLIVAN SMITH,  
*Attorney for Plaintiff in Error, No. 54 Wall Street,*  
*New York, N. Y.*

Endorsed: United States circuit court of appeals. George M. Israel vs. Charles F. Gale, as receiver, etc. Original order of affirmance. Bissell, Sicard, Bissell & Carey, attorneys for def't in error. Office and post-office address, 558 Ellicott square, Buffalo, N. Y. United States circuit court of appeals, second circuit. Filed Mar. 23, 1897. James C. Reed, clerk.

63 Supreme Court of the United States.

GEORGE M. ISRAEL, Plaintiff in Error,  
against  
CHARLES F. GALE, as Receiver of the Elmira National Bank (Substituted for Charles Davis, as Receiver, etc.), Defendant in Error. } Assignment of Errors.

On the — day of February, 1898, the plaintiff in error (defendant) in this action, in connection with his petition for a writ of error herein to the Supreme Court of the United States, makes the following assignment of errors which he says occurred upon the trial of this cause, and the rendition of judgment therein in the United States circuit court of appeals for the second circuit, to wit:

First. The plaintiff in error assigns as errors the several errors set out in the assignment of errors forming part of the record in the above-entitled action before said circuit court of appeals.

Second. The said circuit court of appeals, before which was heard the writ of error, which brought up the record in this action from the circuit court of the United States for the southern district of New York to said circuit court of appeals, erred in making its order on the 23rd day of March, 1897, affirming the judgment of the said

64 circuit court and directing a mandate to issue to the circuit court of the United States for the southern district of New York, directing that court to proceed in accordance with the decision and order of said circuit court of appeals.

Third. And said circuit court of appeals erred in not sustaining the writ of error then before it and not reversing the judgment entered in this action in said circuit court, and in not directing a new trial of the issues raised by the pleadings in said action.

And said George M. Israel, the plaintiff in error, prays that the judgment aforesaid entered herein in the circuit court for the southern district of New York, and the order entered herein, as aforesaid, by the circuit court of appeals, and the judgment of affirmance to be entered in said circuit court for the southern district of New York upon said order of affirmance, for the error aforesaid and for other errors in the record and proceedings aforesaid, be reversed, annulled, and altogether held for naught, and that the plaintiff in error may be restored to all things which he hath lost by occasion of said judgment and order.

FKANK SULLIVAN SMITH,  
Attorney for Plaintiff in Error,  
# 54 Wall Street, New York, N. Y.

Endorsed: U. S. circuit court of appeals, second circuit. George M. Israel, plaintiff in error, vs. Charles F. Gale, as receiver of the Elmira National Bank (substituted for Charles Davis, as receiver, etc.), defendant in error. Assignment of errors. Frank Sullivan Smith, attorney for plaintiff in error, 54 Wall St., New York, N. Y. United States circuit court of appeals, second circuit. Filed Mar. 12, 1898. William Parkin, clerk.

65 In the Supreme Court of the United States.

GEORGE M. ISRAEL, Plaintiff in Error,  
*against*  
CHARLES F. GALE, as Receiver of the Elmira National Bank  
(Substituted for Charles Davis, as Receiver, etc.), Defendant in  
Error.

Petition for writ of error to the Supreme Court of the United States.

Now comes George M. Israel, the plaintiff in error, and says that on or about the 23rd day of March, 1897, the United States circuit court of appeals of the second circuit rendered judgment herein in favor of the above-named defendant in error (being the plaintiff below) and against the plaintiff in error, affirming the judgment of the circuit court of the United States for the southern district of New York, theretofore rendered and entered herein, against the defendant and in favor of the plaintiff below, in which judgment certain errors were committed to the prejudice of this plaintiff in error; all of which will in more detail appear from the assignment of errors which is hereto annexed and filed herewith.

That this action was brought by Charles Davis, as receiver of the Elmira national bank, against the plaintiff in error, upon a promissory note for \$17,000, made to the order of said bank by the said plaintiff in error, and that during the pendency in the said circuit court of appeals of the cause said Charles Davis died, and 66 thereafter the defendant in error, who had been appointed by the Comptroller of the Currency as receiver of said bank, was substituted as a party to this action.

That this is an action at common law by an officer of the United States suing under the authority of an act of Congress, to wit, clause 3 of sec. 629, and clause 4 of sec. 563 of the Revised Statutes of the United States.

That this is a case wherein, according to the act of Congress approved March 3rd, 1891 (26 St. at L., 826), a writ of error may be taken from the circuit court of appeals to this court under the provisions of said act enacting that in all cases other than those specifically mentioned in the 6th section of said act in which the decision of the circuit court of appeals shall be final, and in which category controversies of the nature of this action are not included, there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed \$1,000, besides costs.

That the amount of the note sued upon in this case is \$17,000, with interest.

Wherefore this petitioner prays that a writ of error may issue in this behalf to the Supreme Court of the United States for the correction of the errors herein so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court, as by law and the rules and practice of this court made and provided.

FRANK SULLIVAN SMITH,  
*Attorney for Plaintiff in Error.*

(Endorsed:) U.S. circuit court of appeals, second circuit. George M. Israel, plaintiff in error, *vs.* Charles F. Gale, as receiver, etc., defendant in error. Frank Sullivan Smith, attorney for plaintiff in error, 54 Wall St., New York, N. Y. United States circuit court of appeals, second circuit. Filed Mar. 12, 1898. William Parkin, clerk.

67 In the Supreme Court of the United States.

GEORGE M. ISRAEL, Plaintiff in Error,  
*against*

CHARLES F. GALE, as Receiver of the Elmira National Bank  
(Substituted for Charles Davis, as Receiver, etc.). Defendant in  
Error.

On this 1st day of March, 1898, comes the plaintiff in error and files herein and presents his petition praying for the allowance of a writ of error intended to be urged by him, and praying also that a

transcript of the record, proceedings, and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

Upon consideration whereof I allow the writ of error prayed for, and the clerk is directed to issue the writ of error accordingly.

R. W. PECKHAM,

*Associate Justice of the Supreme Court U. S.*

Endorsed: U. S. circuit court of appeals, second circuit. George M. Israel, plaintiff in error, vs. Charles F. Gale, as receiver of The Elmira national bank (substituted for Charles Davis, as receiver, etc.), defendant in error. Order allowing writ of error. Frank Sullivan Smith, attorney for plaintiff in error, 54 Wall St., New York, N. Y. United States circuit court of appeals, second circuit. Filed Mar. 12, 1898. William Parkin, clerk.

[Endorsed:] U. S. Supreme Court. Israel v. Gale. Copy. Order allowing writ of error.

68                  In the Supreme Court of the United States.

GEORGE M. ISRAEL, Plaintiff in Error,                  }  
   against  
 CHARLES F. GALE, as Receiver of the Elmira National      } Bond.  
   Bank (Substituted for Charles Davis, as Receiver, etc.),  
   } Defendant in Error.

Know all men by these presents that we, George M. Israel, as principal, and John Byrne and Frank Sullivan Smith, as sureties, are held and firmly bound unto Charles F. Gale, as receiver of the Elmira national bank, in the full and just sum of two hundred and fifty dollars (\$250), to be paid to the said Charles F. Gale, as receiver of the Elmira national bank, his certain attorneys, executors, administrators, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 16th day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas lately, at a regular term of the United States circuit court, southern district of New York, in a suit depending in said court between Charles H. Davis, as receiver of said Elmira national bank, plaintiff, and George M. Israel, defendant, a judgment was rendered against said defendant for the sum of seventeen thousand five hundred thirty-five dollars and sixty-three cents (\$17,535.63), damages and costs; and

69                  Whereas the said George M. Israel duly obtained a writ of error from the United States circuit court of appeals for the second circuit, which court, on the 23rd day of March, 1897, rendered a judgment affirming the said judgment in all particulars; and

Whereas this action was brought by the plaintiff, as receiver of

the Elmira national bank, upon a promissory note made by the defendant directly to the order of the bank for the sum of \$17,000; the defendant in his amended answer admits the execution of the note, but denies that there was any consideration therefor, and alleges in substance that he signed the note at the request of David C. Robinson, a debtor of the bank and who dominated its policy, and that said Robinson used said note in collusion with the cashier of the bank to cover up overdrafts of said Robinson at said bank; that said bank was not the holder of said note in good faith or for value or in the regular course of business; and

Whereas the said George M. Israel has sued out a writ of error from the Supreme Court of the United States and filed a copy thereof in the aforesaid suit, and also a citation directed to said Charles F. Gale, as receiver of the Elmira national bank, citing and admonishing him to be and appear at said Supreme Court, of the city of Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the  
said George M. Israel shall prosecute his said writ of error  
70 to effect and answer all costs if he make his plea good, then  
the above obligation to be void; else to remain in full force  
and virtue.

GEO. M. ISRAEL.

[s.]

JOHN BYRNE.

[s.]

FRANK SULLIVAN SMITH.

[s.]

Sealed and delivered in the presence of—  
FREDERIC H. RIDGWAY.

STATE OF NEW YORK, } ss:  
City and County of New York,

John Byrne, being duly sworn, says that he is a resident and a freeholder within the State of New York and worth double the sum specified in the above undertaking over all the debts and liabilities which he owes or has incurred and exclusive of property exempt by law from levy and sale under execution.

JNO. BYRNE.

Sworn to before me this 21st day of December, 1897.

FREDERIC H. RIDGWAY,  
[SEAL.] Notary Public (32), City and County of New York.

STATE OF NEW YORK, } ss:  
City and County of New York,

Frank Sullivan Smith, being duly sworn, says that he is a resident and a freeholder within the State of New York and  
71 worth double the sum specified in the above undertaking over all the debts and liabilities which he owes or has incurred and exclusive of property exempt by law from levy and sale under execution.

FRANK SULLIVAN SMITH.

Sworn to before me this 21st day of December, 1897.

FREDERIC H. RIDGWAY,  
 [SEAL.] Notary Public (32), City and County of New York.

STATE OF NEW YORK, }  
 City and County of New York, } ss.:

I certify that on this 21st day of December, 1897, before me personally appeared the above-named George M. Israel, John Byrne, and Frank Sullivan Smith, known to me to be the individuals described in and who executed the above undertaking, and severally acknowledged that they executed the same for the uses and purposes therein mentioned.

FREDERIC H. RIDGWAY,  
 [SEAL.] Notary Public (32), City and County of New York.

Approved.

R. W. PECKHAM,

*Associate Justice of the Supreme Court  
 of the United States.*

(Endorsed :) U. S. circuit court of appeals, second circuit. George M. Israel, plaintiff in error, against Charles F. Gale, as receiver of the Elmira national bank, defendant in error. Bond. Frank Sullivan Smith, attorney for plaintiff in error, 54 Wall St., New York, N. Y. Approved. E. H. Lacombe, U. S. circuit judge. N. Y., Feb. 6, 1898. United States circuit court of appeals, second circuit. Filed Mar. 12, 1898. William Parkin, clerk.

72 UNITED STATES OF AMERICA, ss.:

To Charles F. Gale, as receiver of the Elmira national bank, Greeting :

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the second circuit, wherein George M. Israel is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States, this first day of March, in the year of our Lord one thousand eight hundred and ninety-eight.

R. W. PECKHAM,  
*Associate Justice of the Supreme Court of the United States.*

72½ [Endorsed :] Due service of a copy of the within citation in error is hereby admitted this — day of March, 1898.  
 \_\_\_\_\_, attorneys for def't in error.

[Stamped :] United States circuit court of appeals, second circuit. Filed Mar. 12, 1898. William Parkin, clerk.

73

## Supreme Court of the United States.

GEORGE M. ISRAEL, Plaintiff in Error,

vs.

CHARLES F. GALE, as Receiver, &amp;c., Defendant in Error. }

STATE OF NEW YORK,  
County of Erie, City of Buffalo, } ss:

Marshal M. Morgan, being duly sworn, deposes and says that he is over the age of twenty-one years and a resident of the city of Buffalo, New York; that on the tenth day of March, 1898, he served the annexed citation in error on the attorneys for the defendant in error by delivering to and personally leaving with the Hon. Wilson S. Bissell a true copy of the said citation in error.

Deponent further says that he of his own knowledge personally knew the said Wilson S. Bissell to be one of the attorneys for the defendant in error mentioned in the said citation in error.

M. M. MORGAN.

Sworn to and subscribed before me this tenth day of March, 1898.

WM. R. DANIELS,  
*Commissioner of Deeds in and for Buffalo, N. Y.*74 UNITED STATES OF AMERICA, } ss:  
Southern District of New York, }

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 73, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of George M. Israel, plaintiff in error, against Charles Davis, as receiver of the Elmira national bank, etc., defendant in error, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 18th day of March, in the year of our Lord one thousand eight hundred and ninety-eight, and of the independence of the said United States the one hundred and twenty-second.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, Clerk.

75 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between George M.

Israel, plaintiff in error, and Charles F. Gale, as receiver of the Elmira national bank, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States. Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the first day of March, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. MCKENNEY,  
*Clerk of the Supreme Court of the United States.*

Allowed by—

R. W. PECKHAM,  
*Associate Justice of the Supreme Court of the United States.*

76 [Endorsed:] Due service of a copy of the enclosed writ of error is hereby admitted this—day of March, 1898. ———, attorneys for def't in error.

[Stamped:] United States circuit court of appeals, second circuit.  
Filed Mar. 12, 1896. William Parkin, clerk.

77 Supreme Court of the United States.

GEORGE M. ISRAEL, Plaintiff in Error,

*vs.*

CHARLES F. GALE, as Receiver, &c., Defendant in Error. }

STATE OF NEW YORK, }  
County of Erie, City of Buffalo, } ss:

Marshal M. Morgan, being duly sworn, deposes and says that he is over the age of twenty-one years and a resident of the city of Buffalo, New York; that on the tenth day of March, 1898, he served the annexed writ of error on the attorneys for the defendant in error by delivering to and personally leaving with the Hon. Wilson S. Bissell a true copy of the said writ of error.

Deponent further says that he, of his own knowledge, personally

knew the said Wilson S. Bissell to be one of the attorneys for the defendant in error mentioned in the said writ of error.

M. M. MORGAN.

Sworn to and subscribed before me this tenth day of March, 1898.

WM. R. DANIELS,  
*Commissioner of Deeds in and for Buffalo, N. Y.*

Endorsed on cover: Case No. 16,828. U. S. C. C. of appeals, 2nd circuit. Term No., 265. George M. Israel, plaintiff in error, vs. Charles F. Gale, as receiver of the Elmira national bank. Filed March 21, 1898.

U. S. DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

MAR 15 1899.

RECEIVED MAR 15 1899

Brief for Plaintiff for  
Supreme Court of the United States.

Filed Mar. 11, 1899.

October Term, 1898.

GEORGE M. ISRAEL,

Plaintiff in Error.

15.

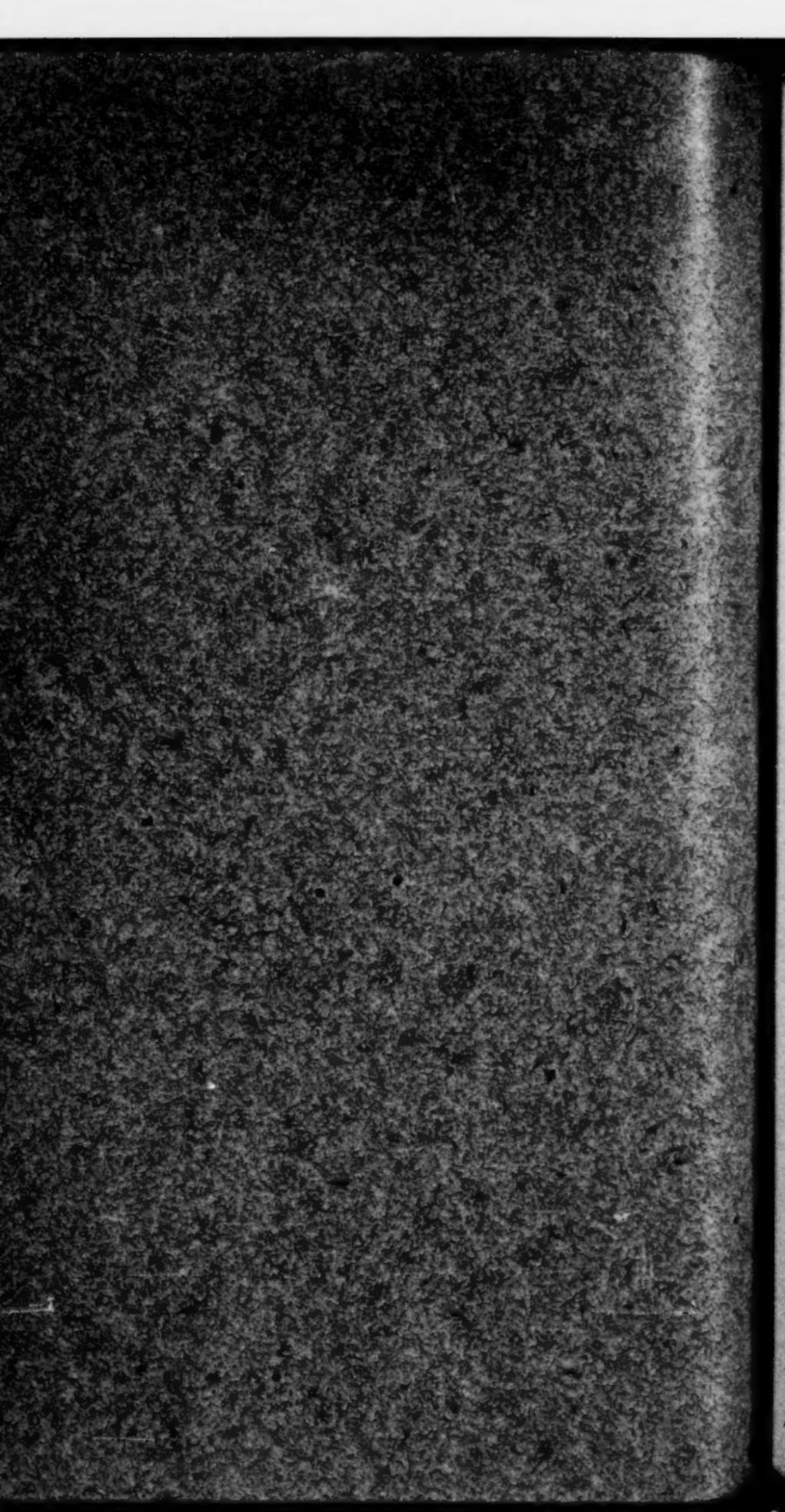
No. 243.

CHARLES H. GALE, as Receiver of The  
Union National Bank (Substituted for  
Charles Davis, as Receiver, etc.)

Brief for the Plaintiff in Error.

FRANK SULLIVAN SMITH

C. C. Clegg



# United States Supreme Court.

OCTOBER TERM, 1898.

GEORGE M. ISRAEL,  
Plaintiff in Error,

*against*

CHARLES F. GALE as Receiver of  
THE ELMIRA NATIONAL BANK,  
(substituted for Charles Davis  
as Receiver, etc.),

Defendant in Error.

No. 265.

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## Statement, Assignment of Errors and Argument on behalf of the Plaintiff in Error.

(The references are to the printed pages of the Record.)

### STATEMENT.

Charles Davis, as Receiver of the Elmira National Bank, commenced an action in the United States Circuit Court for the Southern District of New York against George M. Israel, August 13, 1895 (p. 10), upon a promissory note executed by said Israel in the words and figures following:

### **The Amended Answer,**

" \$17,000.00.

" NEW YORK, May 4th, 1892.

" On demand after date I promise to pay to the  
" order of Elmira National Bank, seventeen thou-  
" sand dollars, payable at the Elmira National  
" Bank. No. 10,996.

" Value received,

GEO. M. ISRAEL."

The complaint is in the usual form, and contains the ordinary allegations (pp. 2-4).

The defendant's answer was filed September 24, 1895 (pp. 4, 5), and his amended answer the month following (pp. 6-8).

### **The Amended Answer.**

1. Admits the incorporation of the Elmira National Bank, and that it carried on the business of banking at the city of Elmira, N. Y. The making of the note set forth in the complaint is admitted, but the alleged delivery thereof to the bank for value is denied.

The defendant alleges that upon making the said note he delivered the same to David C. Robinson ; that said note was without consideration ; that Robinson was not authorized to act as defendant's agent with regard to the note, and, if the same was delivered to said bank by Robinson, he so delivered said note to said bank for his own use, benefit and account, and not as the agent for said defendant, and in no way for the use, benefit and account of said defendant, all of which facts were well known to the bank and its officers.

2. For a second, separate and distinct defense, said defendant alleges that at the time he so made his said promissory note, Robinson, to whom

### The Amended Answer.

the note was so delivered, was a depositor in said bank and a director thereof and controlled and directed the affairs of said bank, and had overdrawn his account in an amount exceeding the amount of \$17,000, for which said note was drawn, and that Robinson delivered said note to the bank to make good in part the amount of said overdraft ; that the bank parted with no value upon the receipt of said note from said Robinson, but merely gave him credit on account for the amount thereof.

The defendant alleged further that at the time of making said note the bank had loaned to Robinson upon his paper up to the legal limit of its right to loan to any one person, and that said note was obtained from the defendant and was used by Robinson for the purpose of evading the law in procuring from the bank a greater amount of money than it was authorized to loan to one individual ; that said bank and its officers well knowing that said note was without consideration and a mere subterfuge to obtain money from said bank contrary to law, and acting in collusion with Robinson, took said note from said Robinson and credited the proceeds thereof to said Robinson's account, to make good to that extent his account, which was at that time overdrawn as aforesaid ; that the taking of the note by the bank under said circumstances was *ultra vires* and unlawful, and neither the bank nor the plaintiff became the lawful owner and holder thereof.

The said amended answer further alleged that at the time the defendant made said note he was not worth any substantial sum, and had no financial standing whatever, which was well known to said Robinson and said bank and its officers ; that the bank and its officers well knowing defendant's inability to pay the note or any part of it, took said note from said Robinson relying solely upon said Robinson's promise to pay the same ; that the

### Facts.

bank and its officers placed no reliance upon defendant in the premises, and advanced money to make good Robinson's account to the amount of said note, not upon the faith of defendant's name and responsibility, but relying wholly upon and looking solely to said Robinson for the payment thereof.

### Facts.

The issues thus joined came on to be tried January 14, 1896, before Hon. NATHANIEL SHIPMAN, Circuit Judge, and a jury.

The plaintiff put in evidence the said note, the defendant admitted the plaintiff's receivership, and the plaintiff rested, and gave no further evidence upon the trial.

The defendant, GEORGE M. ISRAEL, testified that in April and May, 1893, he was employed in the banking house of I. B. Newcombe & Co., as stenographer and typewriter.

The firm were interested with said Robinson in the Elmira properties (testimony of J. J. Bush, p. 23). \*

Said ISRAEL further testified that he was not a man of property ; that he did not receive any consideration for the making of the note ; that at the time of the making of the note Robinson stated to him :

"That he desired some accommodation notes, and he wanted us clerks to make them and stated the amount. He said that the reason he wanted the accommodation notes was that he had exceeded his line of discount and could not get any more accommodation ; that he was building a power house up there (in Elmira) and needed some money to accomplish that purpose, and if we would give these notes it would enable him to accomplish that ; he also added that we would not be put in any position of paying them at any time ;

### Facts.

that he would take care of them and gave us positive assurance on that point, and naturally, knowing the man and thinking that he was a millionaire, \* \* \* we had no hesitation about going on the notes. He said it would simply be a temporary matter. At the time I gave the note in suit other notes were given by Mollenhauer and Roll, who were, with me, clerks in the office of I. B. Newcombe & Co. At that time neither of the members of the firm of I. B. Newcombe & Co. was at his place of business. Mr. Newcombe was in Bermuda, and Mr. Weidenfield was sick with typhoid fever at Orange, N. J. No demand has ever been made upon me for the payment of this note prior to the bringing of this suit.

I never authorized the insertion in the body of the note, after the word 'at,' of the words 'Elmira National Bank.' That space must have been left blank at the time from the fact that it was filled in afterwards; my recollection is that it was left blank" (pp. 10, 11).

JACKSON RICHARDSON, a witness for the defendant, testified that he was the president of the bank in 1892 and 1893; that said Robinson and John J. Bush, the cashier, were the active members of the directory, who had the most to say about the business of the bank (p. 12); that said Robinson controlled the policy of the bank (p. 12); that such discounts as said Robinson obtained either for himself personally or for the company of which he was president, were obtained through the cashier (p. 13); that the capital of the bank was \$200,000, and the bank did not permit Robinson to have over \$20,000 discount, to the knowledge of the witness (p. 14), but the witness added :

"He didn't exceed his line of discount when I was in the city; that is, of my knowledge. Probably he may have done that without my knowledge. It might have been possible for the matter to have been fixed up between him and Mr. Bush and I not know of it" (p. 14).

**Facts.**

The president also testified that he never had any knowledge of the note in suit or the notes of Bowers, Mollenhauer and Roll (pp. 15 ; 16-17) ; he also testified :

"Colonel Robinson usually obtained discounts through Mr. Bush and the finance committee. I don't think that all of the paper discounted by Colonel Robinson, or at his request, or for his benefit, or for the benefit of The Elmira Municipal Improvement Company, was submitted to the finance committee" (p. 16).

Several months before the bank failed the Comptroller of the Currency reported to the president an individual overdraft of Colonel Robinson (p. 13). The letter of the Comptroller was passed to Mr. Bush, the cashier (p. 16).

The president further testified to the effect that subsequent developments had satisfied him that the usual course of business in the bank was not followed in all cases, and that paper was discounted at the bank without being submitted by the cashier to the finance committee.

JOHN J. BUSH, called as a witness for the defendant, testified that he was the cashier of said bank for over three years prior to its suspension ; that the by-laws provided for an exchange committee of the directors to "discount, purchase bills \* \* \* and to buy and sell bills of exchange," but that he did not know of the bank ever having such a committee (p. 19) ; that he first heard of the defendant May 4th, 1893, when said Robinson presented the note in suit to witness at said bank (with the notes of Mollenhauer and Roll) ; and said the makers of the notes were able to pay them ; that they never had paper in the bank prior to that time ; and that witness never made any inquiry as to the responsibility of the makers of the notes from any other person than said Robinson (pp. 19-

## Facts.

20). But the cashier admitted a moment later that the next day after said Robinson's overdraft amounted to \$35,400.60, he permitted him to discount paper amounting to \$54,000, about which the cashier knew nothing, and of whose makers he had never even heard (p. 20).

He subsequently testified, "I have no recollection of asking Mr. Robinson as to the responsibility of that paper" (p. 25). The cashier further testified that said Robinson's account at said bank was overdrawn at the close of business May 3d, 1893, the day before the defendant's, and said Mollenhauer's and Roll's notes were credited to said Robinson's account, \$35,400.60, and it further appears from his testimony that there had been overdrafts in said account since the 12th day of March preceding, except two days, and that April 25th, *the overdraft amounted to \$137,314.00* (p. 21). After trying to put in a special plea for such banking and asserting Robinson's claim that "his account was not overdrawn according to his books," he concluded: "There certainly was an overdraft that showed there weeks and weeks" (p. 21).

The Cashier testified: "It had been the custom of our bank to take such paper as its customers offered" (p. 23). And again: "My instructions from my superiors were to take care of Colonel Robinson's account.

Q. What do you mean by that?

A. That he was entitled to such lines of discount as would be necessary to conduct his business here connected with these properties" (p. 24).

And further: "My instructions were such that I would not have a right to refuse to take the paper of our directors to that amount" (viz: \$54,000) (p. 25).

The capital of the bank was but \$200,000 (p. 14).

When asked in the course of his examination whether he was not influenced in discounting the three notes which included the defendant's, by the

**Facts.**

fact that there was an overdraft of over \$35,000 staring him in the face, the cashier answered "No, sir; I don't know as I knew there was an overdraft" (p. 24). But the next question was:

"Q. You had no suspicion it was any such amount as that?" to which the cashier answered:

"A. I wouldn't say I hadn't any suspicion, because *I knew it was a large amount*" (p. 24).

The cashier also testified: "If the makers hadn't paid them (the Israel, Mollenhauer and Roll notes) I should look to Colonel Robinson" (p. 25).

DAVID C. ROBINSON was called as a witness on behalf of the defendant. He testified that he had been notified by the cashier of the overdraft (p. 26), and that some little time prior to or about May 4, 1893, the date of the note in suit, the cashier had called on him to make his account good (p. 26). He further testified:

"These notes (the notes of Israel, Mollenhauer and Roll) were used at the Elmira National Bank, and the proceeds, I understood, were credited to my account, at the time it was claimed by the bank there was an overdraft. I don't know whether the defendant or any of the others received any consideration at the time I obtained their paper; they didn't receive anything directly from me" (p. 26).

The said Robinson executed to the bank a guaranty in writing of the note in suit and said notes of Mollenhauer and Roll, about May 20, 1893 (p. 27).

When the bank passed into the hands of a Receiver, May 26, 1893, the aggregate amount of so-called Robinson paper in the bank was about \$300,000 and of so-called Bush (the cashier) paper was about \$107,000. The Israel, Mollenhauer and Roll notes were included within "the so-called Robinson paper" and the "so-called Bush paper" consisted of "the notes made by members of his family which had come to the bank through him" (p. 27).

### **Summary of Facts.**

W.M. B. EDSON, who was bookkeeper in said bank, was called as a witness on behalf of the defendant. From his testimony it appears that the place of payment of each of said notes made by Israel, Mollenhauer and Roll was written in by the assistant cashier of the bank (p. 28); that witness saw the said notes at the bank May 4, 1893, that being the day of their date, although they had been theretofore executed in the city of New York, and that the cashier directed that said notes be discounted and placed to said Robinson's account on that day; that such credit was not given until the next day, May 5th, but that by the direction of the cashier the entry of May 5th was erased, and the said notes were credited as of May 4th, the cashier having given such direction by telephone from New York, whither he had gone the night of May 4th; that said Robinson was also in New York when said cashier telephoned from New York; that said Robinson's "account *would have been overdrawn that night about \$50,000 if it had not been for the entry on the books of the proceeds of these notes,*" and that said Robinson's personal notes in the bank then amounted to \$19,000, and the notes upon which he was endorser to \$34,000 (p. 28).

The defendant thereupon rested his case and the evidence was closed.

From the undisputed evidence given upon the trial there may be adduced the following:

### **Summary of Facts:**

1. The note in suit was payable to the order of the Elmira National Bank and was without endorsement (p. 3).
2. The said note was made and delivered without consideration (pp. 10, 11, 26).

**Summary of Facts.**

3. The said note was made and delivered to said Robinson for the sole purpose of being used to aid in building a power house in Elmira, presumably, for the benefit of the properties in which the maker's employers were interested (pp. 10, 11, 23).
4. The said note was diverted from the use to which it was restricted by the maker, and was used with others of the same character, obtained in like manner, for the purpose of covering up an over-draft of the said Robinson at the said bank (pp. 20, 24-25, 26, 28).
5. But for the discount of said three notes, including the note in suit, said Robinson's account at said bank would have been overdrawn May 4th, 1893, about \$50,000 (p. 28).
6. The said note was not discounted in the usual course of business, because the bank looked to said Robinson to pay the same, although he was neither guarantor nor indorser, and the bank did not take said note upon faith in the maker (p. 25).
7. The said bank parted with or advanced nothing in receiving the said note, and its discount was a mere bookkeeping transaction (p. 28).
8. The bank took the said note without knowing the maker or making inquiry as to his responsibility (pp. 20, 21, 25).
9. The officers of the bank knew that there was no consideration passing to the maker of said note from said bank (p. 20).
10. At the time the bank credited the said note to the account of said Robinson, he had procured to be discounted at said bank about \$300,000, and was liable as maker upon \$19,000 of notes, and as indorser in the further sum of \$34,000, while the cashier had procured for the benefit of members of

### **Summary of Facts.**

his family the discount of paper to the amount of \$107,000, the entire capital of the bank being but \$200,000 (pp. 27-28).

11. The said Robinson controlled the policy of the said bank, and obtained discounts for himself personally and for the company of which he was president, through the cashier, without the knowledge of the directors' (pp. 12-14, 16, 18).

12. The said Robinson obtained the said notes, and the cashier of the bank discounted the same unlawfully, and the entire transaction was fraudulent and void.

Counsel for the plaintiff asked the Court to direct a verdict in favor of the plaintiff, to which the attorney for the defendant duly objected, and requested the Court to submit to the jury the several questions specified in the Assignment of Errors, (pp. 12-14, *post*) which the Court severally refused, and the defendant duly excepted (pp. 28-29).

The Court thereupon directed a verdict in favor of the plaintiff and against the defendant, for the amount of the said note, principal and interest, to which the defendant duly excepted (p. 29).

The jury thereupon rendered such verdict in the sum of \$17,000 with interest from the 13th day of August, 1895 (p. 29).

Judgment was entered upon said verdict February 4th, 1896, in favor of the plaintiff and against the defendant for the sum of \$17,535.63, being the amount due upon said note together with costs and disbursements (p. 9).

From this judgment a writ of error issued and the cause was brought up to the Circuit Court of Appeals for the Second Circuit, and the judgment was affirmed on the 23d day of March, 1897 (pp. 36-37).

Error is assigned to the judgment of affirmance and the cause comes here for final review under the provisions of the Act of Congress of March 3d, 1891 (26 St. at L. 826).

### **Assignment of Errors.**

The Assignment of Errors is as follows (pp. 37-38) :

*First.*—The plaintiff in error assigns as errors the several errors set out in the assignment of errors forming part of the record in the above-entitled action before said Circuit Court of Appeals.

*Second.*—The said Circuit Court of Appeals before which was heard the writ of error, which brought up the record in this action from the Circuit Court of the United States for the Southern District of New York to said Circuit Court of Appeals, erred in making its order on the 23d day of March, 1897, affirming the judgment of the said Circuit Court, and directing a mandate to issue to the Circuit Court of the United States for the Southern District of New York, directing that Court to proceed in accordance with the decision and order of said Circuit Court of Appeals.

*Third.*—And said Circuit Court of Appeals erred in not sustaining the writ of error then before it and not reversing the judgment entered in this action in said Circuit Court, and in not directing a new trial of the issues raised by the pleadings in said action.

The errors set out in the record in the Circuit Court of Appeals were the following (pp. 31-33) :

1.

That the Circuit Court of the United States for the Southern District of New York erred in refusing to submit to the jury in accordance with the request of the attorney for the defendant, the question whether upon the evidence in the case the said note given by the said defendant had been diverted from the purpose for which it was obtained, to wit, to enable the said D. C. Robinson to obtain money from the proceeds of said note with others given at

### **Assignment of Errors.**

the same time and in the same manner wherewith to build a power house at Elmira, N. Y., for the use of the corporation of which said Robinson was the president, and in which the firm by which the defendant was employed were interested, and said note was used for a different purpose, to wit, to apparently make good or cover up an overdraft of the said Robinson of long standing at the said Elmira National Bank.

2

The said Court erred in refusing to submit to the jury, in accordance with the request of the attorney for the defendant the question whether under all the circumstances proved in the case, the Elmira National Bank took the said note in good faith, relying upon the contract of the defendant to pay the same.

3

That said Court erred in refusing to submit to the jury, in accordance with the request of the attorney for the defendant, the question whether or not said bank had notice or was put upon its inquiry as to whether there was any consideration passing to the defendant from either said Robinson or the payee named in said note, the said bank; and if put upon its inquiry whether said bank would have ascertained the fact that there was no consideration for said note and that it could not recover upon the same.

4

That said Court erred in refusing to submit to the jury, in accordance with the request of the attorney for the defendant, the question whether, in view of the erasure of the entry of the said notes upon the books of the bank first made May 5th, 1893, and the entry of the same as of May 4th, 1893, by the order of its cashier, the said bank acted in good faith, without notice of any infirmity in said

### **Assignment of Errors.**

note and became a *bona fide* holder thereof for value.

5

That said Court erred in refusing to submit to the jury, in accordance with the request of the attorney for the defendant, the question whether the said fact of such erasure was not a circumstance tending to show the guilty complicity of the said cashier with the said Robinson in taking the said note under such circumstances as would point to his knowledge of the fact that there was no consideration passing to the maker of said note from the payee, the said bank, or from said Robinson.

6

That said Court erred in instructing the jury, as follows:

*"Gentlemen of the Jury.—I cannot see anything in the facts of this case which legally take it out of the ordinary rule with regard to the liability of the maker upon an accommodation note. As I look at it now, I cannot find any material question of fact to submit to you, and you are therefore directed to render a verdict for the full amount of \$17,000 and interest, which counsel can agree upon."*

7

That said Court erred in directing a verdict in favor of the plaintiff and against the defendant for the amount of said note.

Charles F. Gale as receiver of said bank was substituted as defendant in error in place of said Charles Davis, deceased, by an order duly entered August 10th, 1896.

The circumstances in which the note in suit was made and the manner of its use were so extra-

**Argument.**

ordinary as to cause one to hesitate to dignify the instrument with the name of promissory note, or to invoke, as applicable thereto, the honored rules of law relating to commercial paper. The contract evidenced by the writing in suit was only a device to conceal the violation of a Federal statute, evidently concocted by the cashier of the bank and a director whose account was overdrawn. On its face the contract was only between the maker and the bank which was named as payee; there was no other party to the pretended contract. The payee knew that there was no consideration issuing from it to the maker of the note, and was put upon inquiry to ascertain whether there was any consideration passing to the maker from any other source which could make the note a valid contract. There was no such consideration, and there can be no recovery upon the note.

But to take up and discuss the exceptions, as they were taken upon the trial, suggests, in behalf of the plaintiff in error, the following :

**Argument.**

The statement of the facts proved upon the trial, all of which were undisputed, ought to be sufficient to convince this Court of the error committed by the Court of Appeals in sustaining the trial Court in refusing to submit to the jury the several questions proposed by the defendant's counsel for submission, and in directing a verdict against the defendant.

**Points.****FIRST.**

**Robinson's transaction with the bank did not bind the maker of the note.**

The Circuit Court of Appeals, in affirming the ruling of the Circuit Court, say:

"Assuming that there was enough in the circumstances attending the reception and discount of the paper by the bank to charge it with notice that the note in suit was an accommodation note made for the benefit of Robinson and, without other consideration, the bank was a purchaser for value and entitled to enforce it against the maker. That it was a purchaser for value, although it did not advance any money upon the note, but merely gave Robinson credit for the amount upon his precedent indebtedness, is entirely clear upon the authorities which prevail in this Court.

*Swift vs. Tyson* (16 Peters, 1); *National Bank of the Republic vs. Brooklyn City Railway Co.* (14 Blatch., 242), affirmed 102 U. S., 14. \* \* \*

The note having been made for the purpose of being discounted by the Elmira National Bank and having been used for that purpose by Robinson, effected the substantial object for which it was designed. Robinson did not promise the defendant or the makers of the other notes, to use the avails in any particular way; and as none of the makers had the remotest concern in the building of the power house or in his disposition of the avails, his statement of the reasons, which led him to apply for aid and of the use for which he wanted it, was not of material matter, and could not have been in a legal sense an inducement for the accommodation. The case is quite analogous to *Mohawk Bank vs. Corey* (1 Hill, 513). The evidence was wholly insufficient to charge Robinson with a fraudulent

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diversion of the paper and the trial Judge correctly refused to submit any issue involving that question to the jury."

Opinion, WALLACE, P. J., (p. 36).

It will be noticed that the Court considered the case one involving the rules governing accommodation paper ; and this conclusion, it is submitted, was unauthorized for the reasons hereinafter stated ; and therefore the Circuit Court erred in directing a verdict for the plaintiff.

The theory upon which the trial Court proceeded and which was affirmed by the Circuit Court of Appeals was, it is submitted, wholly wrong.

The note in suit was not an accommodation note.

In the case of Bradshaw *vs.* Miners' Bank of Joplin (81 Fed., 902), the appellants Bradshaw and Henry had purchased certain property of a Lead and Zinc Company, for which they had executed their promissory notes to the Miners' Bank, which it was averred had no interest of its own in the notes, but was made payee at the request and solely for the benefit of the Zinc Company. At the same time one Thompson had executed to the bank a guarantee of payment of the notes. A judgment having been obtained on the guarantee against Thompson, Bradshaw and Henry brought suit in equity to enjoin the prosecution of a creditor's bill filed by the bank against Thompson to enforce collection of the judgment. Said the Circuit Court of Appeals, per Woods, J. (at p. 904) :

" It is urged on the authority of Railroad Co. *vs.* National Bank (102 U. S., 14), and other cases which follow Swift *vs.* Tyson (16 Pet., 1), that the Miners' Bank, on the facts alleged, became an in-

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**FIRST.** *Robinson's transaction with his bank was not binding on the maker of the note.*

nocent holder for value of the notes of the appellants, and that its right to enforce the guaranty cannot be affected by an inquiry into the consideration of the notes. The doctrine of *Swift vs. Tyson*, so far as we know, has never been applied in the manner proposed. It is averred in the bill that the notes were made payable to the Miners' Bank as agent or trustee for the Illinois & Missouri Lead & Zinc Company, but, if that were not so, and the beneficial interest in the notes were in the bank, yet the title, having come to it as the original payee of the notes, and not as transferee, would be subject, we suppose, to all infirmities in the original consideration between appellants and the Illinois & Missouri Lead & Zinc Company, unless in the circumstances and conditions of the transaction there was in favor of the bank an estoppel in equity. There is none in the law merchant."

This case is of particular value in its explanation and limitation of the application of the two cases in this Court principally relied on by the Court below.

The same position is also taken by the Supreme Court of the Territory of Oklahoma in the case of *Hagan vs. Bigler*, 49 Pac. Rep., 1011. The suit was commenced upon a promissory note for \$500, payable on or before one year after date, executed by Hagan and wife to the order of Ella Bigler. The answer was a failure of consideration and also that the note had never been delivered. On the trial of the cause it appeared on the defendants' behalf that an agreement in the case of Frank Bigler against Hagan had been entered into providing that this action, which was brought to dissolve the partnership affairs between them, should be dismissed by Bigler; that the plaintiff should pay all the costs of either party in the said action,

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except the defendant's attorney's fees; that the Court should make an order upon the Receiver to pay over all moneys which he had received from the sale of the partnership property and turn over the unsold property to Hagan. Hagan and his wife were to dismiss and did dismiss, another action pending between Martha Hagan and H. B. Mitchell, Receiver of the firm of Hagan & Bigler. The agreement also recited: "In consideration of the turning over of said moneys and delivery of said unsold property to Joseph Hagan, the said Joseph Hagan has this day executed and delivered to Frank Bigler his certain promissory note for \$500." For the purpose of showing that subsequent to the making of the agreement a parol agreement was entered into between the parties by which the note should be made payable to Ella Bigler and should be placed in the hands of one Jones to be delivered to her when and not until the moneys and property in the hands of the Receiver should be turned over to Hagan and the costs in the action paid by Bigler, the defendant offered evidence showing that the note was placed in the hands of Jones and that although the moneys and property in the hands of the Receiver had never been in fact turned over to Hagan, the note was delivered by Jones to Mrs. Bigler, without the knowledge of Hagan. The Court below had refused to permit evidence of the subsequent parol agreement or that the terms of the original agreement had not been complied with. On appeal the Supreme Court sustained the exception taken by the defendant to the refusal of the trial Court to admit the evidence mentioned, and in the course of a well sustained opinion by TARSNEY, J., said:

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"The cause seems to have been tried upon the theory that the plaintiff was an innocent holder of said note, free from any equitable defenses. It may be stated, generally, that the *bona fide* holder takes negotiable paper free from all equitable defenses—that is, those defenses which do not appear on the face of the paper, and which do not absolutely destroy the existence of the paper as a monetary obligation. But who are the *bona fide* holders? The payee of a note is not a *bona fide* holder. A *bona fide* holder of a negotiable instrument is one to whom the instrument has been transferred by the payee, or by some subsequent indorsee, for value and before due, and without notice of any defect in the instrument. The law relating to *bona fide* or innocent holders of negotiable paper does not apply in actions between the maker and the payee. Between the original parties, any equitable defense may be interposed by a maker. He may show that the note was never delivered. He may show an entire or partial failure of consideration. He may show that an agreement or contract upon the part of the payee, which was of the consideration for the note, has never been kept."

A glance at the case of *Mohawk Bank vs. Corey*, 1 Hill, 513, relied on by the Circuit Court of Appeals, is sufficient, it is submitted, to show its inapplicability to the case at bar.

In the case cited the payee had sued the maker and accommodation endorsers of a note which was discounted by the bank payee, and actual value *received by the drawer*. The accommodation endorsers sought to raise the question that the proceeds of the note had been misapplied, and it was, of course, held that having no interest in the purpose for which the funds were to be used, their defense, in view of the ample consideration *received from the bank by the maker of the note was unavailable*.

In the case at bar it is not for a moment claimed

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that Israel ever received any consideration for making the note, nor were there any accommodation endorsers.

Whether or not the maker and Robinson may have intended it as an accommodation note, they did not carry out such intention, and the note in suit is not made in form an accommodation note. It is a note made payable directly to the order of the bank. It had no inception until it was delivered to the bank (*Messmore vs. Meyer*, 56 N.J.L., 31; 27 Atl. Rep., 938); and even then it had no validity unless some consideration therefor passed either directly from the bank to the maker, Israel, or to some other person upon the order of the maker. It is undisputed on the record that the maker, Israel, never had any personal transaction with the bank, and, therefore, no consideration can have passed directly to him from the bank. It is also undisputed that the only intermediary between the maker and the bank was Robinson. If Robinson was not authorized to act in the premises, then the note never had an inception. If Robinson was authorized to act, it must have been either as agent for the maker, or as agent for the bank (*Messmore vs. Meyer, supra*).

The facts in the case above cited were as follows: The defendants who, at that time, were nowise in debt to the plaintiff, at the request of one Simmons, for his (Simmons's) and plaintiff's accommodation, gave their note to plaintiff for the sum of \$7,500. They took back a receipt from Simmons stating that the note was made for the accommodation of plaintiff and Simmons. Simmons was in debt to plaintiff \$7,500 on a note that was past due. Simmons delivered the note in suit to plaintiff. *Held,*

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that the note was an accommodation note as between plaintiff and defendants. MAGIE, J., in giving the opinion of the Court, says:

"But it was made payable to plaintiff's order, and it came into legal existence either when defendants delivered it (the note) to Simmons, or when Simmons delivered it to the plaintiff. If the delivery of the note by defendants to Simmons gave it existence, it is obvious that Simmons was the agent of the plaintiff to accept delivery. Plaintiff, therefore, was bound by his acceptance, which was for the accommodation of himself and Simmons.

If the delivery of the note by Simmons to plaintiff gave it existence it is obvious that Simmons was the agent of the defendants. He was not, however, a general agent, but a special agent intrusted with the note to deliver to plaintiff as an accommodation to him and Simmons. His authority was thus limited and no representations of Simmons could enlarge that authority. As the note was made payable to plaintiff, to whom defendants were not indebted at all, the possession of it did not tend to hold out Simmons as possessed of greater authority than that actually conferred upon him. In either view plaintiff must be considered as having taken the note for his accommodation, and therefore, he acquired no right of action thereon against defendants."

If Robinson was the agent of the bank, the bank is bound by his knowledge of the actual conditions under which the note was signed by the maker. If Robinson was the agent of the maker, he was bound by the terms of his agency. If such agency existed what were its terms? Israel, the maker, testified that he gave the note to Robinson to assist him in raising money to complete a power house for The Elmira Municipal Improvement Co., at Elmira, N. Y. This testimony stands undisputed, and must be taken as disclosing the terms of the agency.

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Robinson, in any view of the case, can be held to be no more than the special agent of the maker, to conduct this particular transaction and no other. The maker had not held him out to be his agent; he had not communicated to the bank either directly or indirectly the fact of such agency. The bank learned such fact, if at all, from Robinson; and the bank dealing with Robinson as such special agent of the maker, relying solely upon his representations as to his authority, did so at its peril and cannot hold the principal, Israel, if the agent, Robinson, acted without the scope of his authority.

"Parties dealing with an agent assuming to be authorized to draw, accept or indorse negotiable paper, must see to it that his authority is adequate and both they and the agent must keep strictly within the limits fixed to the agent's authority or the principle will not be bound. Thus authority to draw and discount a note for a given purpose implies no power to draw and discount one for another and different purpose."

Mechem on Agency, Sect. 393.

"The general rule, that when an attorney does any act beyond his power, it is void even as between the appointee and the principal, has always prevailed, and is indeed elementary in the doctrine of powers. The ground on which the rule rests is familiar. The appointee need not deal with the attorney unless he choose; and it is very reasonable that he should be bound to inspect the power, when in writing, or to learn its language in the best way he can, when it is by parol. On becoming acquainted with it he shall be holden to understand its legal effect, and must see, at his peril, that the attorney does not transgress the prescribed boundary in acting under it.

Opinion, Cowan, J., in North River Bank *vs.* Aymar, 3 Hill, 262, 266.

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And again at page 274:

"In the cases cited, the question in debate was, whether by authorizing the agent to issue notes in the name of the principal, without words expressly restricting the issue to his own business, he did not confer the power of issuing them for everybody, even including the attorney. That the power was to be thus construed was contended in the case before us, and in *Stainer vs. Tysen*. We have arrived at the conclusion without much difficulty, that to give the power so great an effect, the principal must go farther and expressly declare his meaning that the attorney may use his notes for the benefit of others besides the principal."

"The plaintiff's testator, taking the notes in suit, made by an agent professing to represent the defendants as his principal, is presumed to have known the terms of the power under which the agent assumed to act. He was bound to ascertain and know the character and extent of the agency, and the words of the instrument by which it was created, before giving credit to the agent. If the testator dealt with the agent without learning the extent of the powers delegated to him, he did so at his peril, and must abide by the consequences, if the agent acted without or in excess of his authority."

Opinion, ALLEN J.,

*Craighead vs. Peterson*, 72 N. Y., 279,  
283.

"It is, of course, correct to say that if a principal puts his agent in a position to impose upon an innocent third person, by apparently pursuing his authority, he shall be bound by his acts. It is, however, equally true that one dealing with an agent must look to the extent and scope of his agency, and that an implied or ostensible agency is never to be construed to extend beyond the obvious purpose for which it is apparently created."

*Wheeler vs. Northwestern Sleigh Co.*,  
39 Fed. Rep., 347, 349, opinion by  
JENKINS, J.

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**FIRST.** *Robinson's transaction with his bank was not binding on the maker of the note.*

In Dowden *vs.* Cryder, 55 N. J. L., 329; 26 Atl. Rep., 941 (Ct. Errors and Appeals, N. J.), the facts were as follows :

E. H. Carmack drew a draft on the defendant for \$3,200 payable four months after date to his own order, and defendant accepted it for Carmack's accommodation. Thereupon Carmack indorsed it, and delivered to one Barnett, with authority to negotiate it for cash at a reasonable discount. Barnett transferred it to the plaintiff for \$2,060 and a diamond necklace, valued at \$1,000, and then absconded. At the time of the transfer the plaintiff knew that Barnett was not the owner of the draft, but held it merely as agent of Carmack for negotiation. Carmack repudiated the transfer, and the draft went to protest ; hence the suit. In the opinion, DIXON, J., says, page 942 :

" The defect found in the plaintiff's title sprang, not from the law relating to commercial paper, but from the law of agency. It is a universal principle of the law of agency that the powers of the agent are to be exercised for the benefit of the principal and not of the agent or third parties. Persons dealing with one whom they know to be an agent, and to be exercising his authority for his own benefit, acquire no rights against the principal by the transaction " (citing *Stainer vs. Tysen*, 3 Hill, 279; *Bank vs. Underhill*, 102 N. Y., 336, and other cases). \* \* \* " The declarations of an agent, although accompanying his acts, constitute no evidence of the extent of his authority " (citing, among others, *Story on Agency*, Sect. 136; *Farmers' Bank vs. Butchers' Bank*, 16 N. Y., 134).

And again he says, at page 143 : " In our view of the evidence, the trial might properly have been concluded by a direction that the jury find a verdict in favor of the defendant. Barnett was only a special agent, and his authority was to negotiate the draft for cash at a reasonable discount. This

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**FIRST.** *Robinson's transaction with his bank was not binding on the maker of the note.*

did not authorize him to negotiate the draft for cash and merchandise. The plaintiff dealt with him as agent, and was therefore bound to ascertain the extent of his power. \* \* \* The contract between the plaintiff and the agent having been beyond the agent's authority, it gave the plaintiff no rights against the principal."

Not only must the bank be held to be bound by the actual terms of the agency, if any, which existed between the maker and Robinson, but the crediting of the proceeds on the books of the bank to the overdrawn individual account of the agent was actual knowledge on the part of the bank that the proceeds of the note did not go to the maker. Payment by A to C is not payment by A to B, unless B has authorized the payment by A to C on his account. The burden of proof is on A to show such authority from B to make the payment to C. The burden of proof, in the case at bar, was on the bank to show that Israel, the maker of the note, had authorized the crediting of the proceeds of the note to the overdrawn account of Robinson. This the bank did not attempt to show, and it appears from the testimony of the defendant's witnesses that such was not the case.

The motion of the plaintiff in the Court below that the Court direct a verdict in his favor, and against the defendant, should have been denied for the reasons already assigned in support of the several requests preferred by said defendant for submission to the jury of the questions proposed, and because the entire transaction is "repugnant to the morals of the times."

The defendant in error cannot successfully invoke the time-honored rules of commercial law as applicable to this case, and the note in suit comes within the following rule :

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#### **SECOND. *The note had no legal inception.***

"If the contract bind the maker to do something opposed to the public policy of the State or nation, or conflict with the wants, interests or prevailing sentiment of the people, or our obligations to the world, or is repugnant to the morals of the times, it is void, however solemnly the same may be made."

Rule II, Greenhood's Doctrine of Public Policy in the Law of Contracts.  
 See also Rules X, CCCCLXVIII, *id.*  
*Swords vs. Owen*, 43 How. Pr., 176.  
*Fowler vs. Scully*, 72 Pa. St., 456.  
*O'Hare vs. Sec. Nat. Bank*, 77 *id.*, 96.  
*Bly vs. Sec. Nat. Bank*, 79 *id.*, 453.  
*Mapes vs. Sec. Nat. Bank*, 80 *id.*, 163.  
*Nassau Bank vs. Jones*, 95 N. Y., 115.

#### **SECOND.**

#### **The note in suit was without consideration, and never had a legal inception.**

It will not be disputed that between the immediate parties to a contract it may be shown that there was no consideration; and that the maker and payee of a promissory note are such immediate parties.

Daniel on Negotiable Instruments,  
 § 174.  
*Wilson vs. Ellsworth*, 25 Neb., 246;  
 41 N.W. Rep., 177.  
*Eastman vs. Shaw*, 65 N. Y., 522.

The paper was what ABBOTT, Ch. J., in *Downes vs. Richardson*, 5 Barn. & Ald., 657 (7 Com. Law Rep., 227), terms "an unavailable instrument," and

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"the principal parties to it had no right of action *inter se.*"

See also

Daniel on Negotiable Instruments,  
§ 191.

Arden *vs.* Watkins, 3 East, 317.

Wills *vs.* Freeman, 12 East, 656.

Sec. Nat. Bank *vs.* Howe, 40 Minn.,  
390.

The defendant in error made no attempt upon the trial to show that any consideration passed to the maker of the note, except by the cross examination of the maker, and such cross examination but strengthened the evidence given upon his examination in chief. This was an evident attempt to show that Robinson paid or was to pay something to the maker of the note by way of consideration. The plaintiff was bound to know that no consideration passed from the payee to the maker.

That there can be no recovery in such a case, there is abundant authority.

The case of Vorce *vs.* Rosenbury, 12 Neb., 448, was one in which the alleged consideration moved, not from the payee, but from a third party, creditor of the maker, who caused the note to be executed to the payee. The Court said :

"The notes sued on here although negotiable, were never negotiated, nor were they transferred to the plaintiff in error in the usual course of business. The defendant in error testified on the stand that he had never seen Mr. Vorce (the maker) when the notes were executed, had never had any dealings or business transactions with him ; he was not present. So we think that the making of these notes payable to Mr. Vorce, under the circumstances, was a very unusual transaction."

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In Evansville National Bank *vs.* Kaufmann, 93 N. Y., 273, RUGER Ch. J., at page 291, said :

" If no liability is incurred in favor of a third party unless he has parted with value, much less can it be claimed that it is in favor of an original party to the contract, from whom, as is shown affirmatively, no consideration whatever proceeded."

In Smith *vs.* Weston, 88 Hun, 25, a note payable to one who was indebted to the plaintiff was indorsed by the payee and another, and was used by the payee in renewal of another promissory note of like amount, made by the same makers, and indorsed in like manner. It was held that the plaintiff could not recover against the second indorser.

The Court said (p. 514) :

" Taking the note directly from the makers, in renewal of a loan previously made to them was evidence to the plaintiff that the defendant's indorsement was for the maker's accommodation and without consideration."

Not only was the note without consideration between the immediate parties, but the discount thereof by the bank furnished no consideration to Robinson, who procured such discount.

Mr. Daniel in his work on Negotiable Instruments says :

" § 779c. *The apparent purchase must have been a purchase in fact, and not a mere bookkeeping entry.* Mere discount and credit do not of themselves constitute a *bona fide purchaser* for value. To occupy that position the holder must actually have parted with something of value for the note."

Citing

Manufacturers' Nat. Bank *vs.* Newell,  
71 Wis., 312.

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**SECOND.** *The note had no legal inception.*

In *Platt vs. Chapin*, 49 Barb., 318:

"A check was made for the accommodation of the payees who paid nothing therefor, and who having received it deposited it in the Stuyvesant Bank duly endorsed by them, the bank crediting them upon its books with the amount thereof."

The Court continued :

"The statement of the case would seem to be conclusive argument against the right to recover. The bankrupt institution which the plaintiff represents has never parted with a cent, and if a recovery is to be had it is upon the technical ground that the valueless credit it gave upon the books to the payees of the check made it a *bona fide* holder of the instrument \* \* \*. It has in fact parted with nothing, and the credit it gave the payees represents really nothing."

In *Hume, Webster & Co. vs. The Howe Machine Co.*, 54 Conn., 394, a draft was discounted and applied to an existing indebtedness of the drawer to the plaintiffs, they not discharging the debt or relinquishing anything of value.

*Held*, that by the law of New York the plaintiffs were not *bona fide* holders for value.

**PARDEE, J.**, said :

"There is neither claim nor proof nor ground for the assumption that they agreed to or did release A. B. Stockwell (the drawer) from any portion of his liability to them upon their book account against him by the mere reception of the draft and the credit upon that account of the proceeds resulting from the endorsement and sale thereof. There is no proof of any express, and there can be no assumption of any implied agreement that it was received in absolute payment and satisfaction, or in discharge of any portion of the drawer's liability to them ; no proof nor presumption that upon dishonor of the bill they could not have enforced to the fullest extent their original account against

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him ; no proof that upon the reception of the draft they parted with any right or property ; no proof that they are not now in every respect in as good condition as if they had not received it."

"The true question in all such cases is, 'Did the holder part with value for the bill or not ?' If not, then he is not to be treated as a *bona fide* holder for value ; \* \* \* if there is no agreement that it is taken in extinguishment of the indebtedness, so that the debt is not legally discharged, he has parted with nothing and is not a holder for value."

Edwards on Bills and Notes, § 452,  
citing :

Spear *vs.* Meyers, 6 Barb., 445.

White *vs.* Springfield Bank, 1 *id.*, 225.

Stewart *vs.* Small, 2 *id.*, 459.

Young *vs.* Lee, 18 Barb., 187.

Phoenix Ins. Co. *vs.* Church, 81 N. Y.,  
225.

Atlantic Nat. Bank *vs.* Franklin, 55  
N. Y., 235.

See also—

Thompson *vs.* Sioux Falls Nat. Bank,  
150 U. S., 231, 244.

Dresser *vs.* M. & I. R. R. Co., 93 U.  
S., 92.

Lancaster Nat. Bank *vs.* Haver, 114  
Pa. St., 216.

Dougherty *vs.* Cent. Nat. Bank, 93 Pa.  
St., 227.

Clark *vs.* Nat. Bank of Albion, 52  
Barb., 592.

Drilling *vs.* First Nat. Bank, 23 Pac.  
Rep., 94.

Balbach *vs.* Frelinghuysen, 15 Fed.,  
675.

Sixth Nat. Bank *vs.* Lorillard Brick  
Works, 46 N. Y. State Rep., 235 (18  
Suppl., 861).

*Nippino vs. Ridgway*, 153 A. Y. 130.

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**THIRD.** *The question of the diversion of the note was for the jury.*

In the case last cited the Court said :

"The bookkeeping entries constitute no parting with value, within the rule making a plaintiff a *bona fide* holder so as to exclude existing equities between the parties. (*Phoenix Ins. Co. vs. Church*, 81, N. Y., 218; *McQuade vs. Irwin*, 39 Supr. Ct., 396; *Buhrman vs. Baylis*, 14 Hun, 608.)"

### THIRD.

**The Trial Court should have submitted to the jury the question whether the note in suit had been diverted from the purpose for which it was given by the maker.**

The Circuit Court of Appeals held (p. 36).:

"The note having been made for the purpose of being discounted with the Elmira National Bank, and having been used for that purpose by Robinson, effected the substantial object for which it was designed."

This conclusion, it is submitted, is unauthorized. There were sufficient facts to at least authorize and require the Circuit Court to submit to the jury the question whether the note had been diverted from the purpose for which it was given.

The purpose for which the plaintiff in error was induced to give to Robinson the note in suit was to enable said Robinson to finish the building of the power house in Elmira, for the benefit of The Elmira

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**THIRD.** *The question of the diversion of the note was for the jury.*

Municipal Improvement Company, of which said Robinson was the president, and in which the employers of the plaintiff in error were interested. Upon receiving the note the bank parted with nothing. The discount of the note was a mere bookkeeping transaction for the purpose of covering up Robinson's overdraft. The cashier testified that he looked to Robinson to pay the note, if the maker did not, and, in support of this evident understanding between the cashier and Robinson, the latter subsequently executed a guaranty in writing of said note. The diversion of the note shifted the burden of proof upon the holder, and became a question for the jury; and in considering this question the rule of decision under the statutes of New York is controlling.

Patent Title Co. *vs.* Stratton, 89 Fed.,  
174.

Mr. DANIEL, in his work on Negotiable Instruments, says:

“§ 791. *The rule in New York.* There it is held that a diversion is such a fraud as to shift the burden of proof upon the holder.”

Citing:

- Farmers' & Citizens' Nat. Bank *vs.* Noxon, 45 N. Y., 762.
- Grocers' Bank *vs.* Penfield, 7 Hun, 279.
- Moore *vs.* Ryder, 65 N. Y., 439.
- Spencer *vs.* Ballou, 18 N. Y., 331.
- Schepp *vs.* Carpenter, 51 N. Y., 604.
- Comstock *vs.* Hier, 73 N. Y., 270.

And again, in the same section:

“The fraud which shifts the burden of proof

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must be in the consideration, or *representations used in obtaining the execution of the instrument.*"

In the next section this author defines a misappropriation as "a fraudulent diversion from the original object and design."

It was held in the case of *Benjamin vs. Rogers*, 126 N. Y., 70, that the surety "may always fix the precise terms upon which he is willing to become a surety, whether those terms seem to be material or immaterial."

In the case of *United States National Bank vs. Ewing*, 131 N. Y., 506, the indorser of a promissory note for accommodation was assured that the note would be negotiated in Kentucky. The note was transferred by the maker to the plaintiff bank as security upon a precedent debt.

**FINCH, J.**, said (p. 507) :

"The holder parted with nothing upon receiving it, surrendered no right and no security, and made no new agreement in reliance upon it. In its hands it was therefore open to the defense that, made for one purpose, it had been used for another, and that its diversion had served to discharge the indorser.  
 \* \* \* The restriction here does not seem to be material, and yet may have been so in the mind of the indorser and for reasons sufficient to him. \* \* \* If his testimony, read in connection with the writing (the note), left possible the inference that no restriction was intended, the inference was one of fact and not of law, and should have been left to the judgment of the jury."

See also :

*Bruyn vs. Russell*, 60 Hun, 280.  
*Wardell vs. Howell*, 9 Wend., 170.  
*Farmers', etc., Bank vs. Hathaway*, 36 Vt., 539.

**Points.****FOURTH.**

**The facts proved upon the trial were sufficient to require the submission to the jury of the question of the good faith of the bank in taking the note in suit, and it was error in the trial Court to refuse to submit the question to the jury.**

Upon the question of the *bona fides* of the bank, the plaintiff in error made four distinct requests for submission to the jury, all of which were severally refused by the trial Court, and each refusal has been duly assigned as error (see Assignment of Errors in Circuit Court, 2, 3, 4, 5 pp. 3 and 33). These questions were :

- (1.) Whether, under all the circumstances in the case, the bank took the said note in good faith, relying upon the contract of the maker to pay the same ?
- (2.) Whether or not said bank had notice, or was put upon inquiry as to whether there was any consideration passing as to the maker of the note from either Robinson or said bank ; and if put upon inquiry, whether said bank would have ascertained the fact that there was no consideration for said note, and that said bank could not recover upon the same ?
- (3.) Whether, in view of the erasure of the entry of the note in suit with the two others upon the books of the bank, first made May 5th, 1893, and the entry of the same as of May 4th, 1893, by the order of the cashier, the said bank acted in good faith, without notice of any infirmity in the note, and became a *bona fide* holder thereof for value ?
- (4.) Whether such erasure was not a circumstance

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FOURTH. *The question of the bona fides of the bank was for the jury.*

tending to show the guilty complicity of the cashier with Robinson in taking the note under such circumstances as would point to his knowledge of the fact that the note was without consideration?

The Circuit Court of Appeals said (Opinion, p. 35) :

“Assuming that there was enough in the circumstances attending the reception and discount of the paper by the bank to charge it with notice that the note in suit was an accommodation note made for the benefit of Robinson and without other consideration, the bank was a purchaser for value and entitled to enforce it against the maker.”

This statement, it is submitted, not only proceeds upon a wrong theory, but does not cure the error of the trial Court above referred to.

The witnesses from whom were obtained the story of the manner in which the affairs of the bank were conducted, and the important part which the worthless paper of the plaintiff in error and his fellow-clerks was made to play, were all connected with the wrecked bank, and were evidently counseled by caution in the testimony which they gave. Yet it was established upon undisputed evidence that some months before the failure of the bank the Comptroller of the Currency had discovered and complained of an overdraft in Robinson's individual account; that all of Robinson's discounts were obtained *through the cashier*; that the aggregate amount of discounts obtained by Robinson and unpaid at the time of the failure of the bank was about \$300,000, while the cashier had obtained for members of his family about \$107,000; that said Robinson's individual account had been almost constantly overdrawn for six weeks prior to May 4th, 1893, and that on April 25th, 1893, such

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overdraft amounted to \$137,314 ; that the overdraft was \$35,400.60 the night before the final entry of the discount of said notes, and that but for such entry said Robinson's account would have been overdrawn May 4th, 1893, about \$50,000 ; that it had been the custom of the bank to take such paper as its customers offered ; that the cashier's instructions from his superiors were "take care of" Robinson's account ; that he would not have a right to refuse to take the paper of directors to the amount of the said three notes ; that the cashier knew nothing about the makers of these notes, and *made no inquiries as to their responsibility* ; that the alteration of the books of the bank to show the entry of such discount as of May 4th instead of May 5th, was made by telephonic order of the cashier from New York, for the evident purpose of concealing the overdraft from the Comptroller of the Currency, and the notes had been obtained prior to the date which they bore, in order to be in readiness for such use ; that *they were executed in New York but were in the bank at Elmira the day of their date.*

In the words of RUGER, Ch. J., in Canajoharie Nat. Bank *vs.* Diefendorf, 123 N. Y., 191, at page 206, the conduct of the cashier was "unusual, imprudent and inconsistent with the character which he seeks to maintain as a *bona fide* holder."

This array of facts wrung from unwilling witnesses, together with the positive proof given by the maker of the note that it was without consideration, and was executed and delivered upon representations that it was to be used for quite another purpose, was sufficient to shift the burden of showing good faith upon the holder of the note, and to entitle the maker of the note to

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go to the jury upon the question of the good faith of the holder.

In such circumstances the question of *bona fides* is for the jury.

*Canajoharie Nat. Bank vs. Diefendorf,*  
123 N. Y., 191.

*Vosburgh vs. Diefendorf*, 119 N. Y.,  
357.

*Kavanagh vs. Wilson*, 70 N. Y., 177.

*Joy vs. Diefendorf*, 130 N. Y., 6.

*Farmers' and Citizens' Nat. Bank vs.*  
*Noxon*, 45, N. Y., 462.

In *Canajoharie Nat. Bank vs. Diefendorf, supra*, the Court of Appeals, per RUGER, Ch. J., at pp. 200, 206, said, referring to the intent of the cashier

in the transaction, that it was "co-extensive with that of the plaintiff (the bank), and brings him directly within the cases which hold that the credibility of such a witness" is a question for the jury (*Elwood vs. W. U. T. Co.*, 45 N. Y., 549; *Honegger vs. Wettstein*, 94 N. Y., 252). \* \* \*

Such evidence is also for the jury where the evidence of the witness shows *his conduct to have been unusual, imprudent and inconsistent* with the character which he seeks to maintain as a *bona fide* holder (*Stilwell vs. Carpenter*, 2 Abb. N. C., 239; *Moody vs. Bell*, *id.*, 275; *Kavanagh vs. Wilson*, 70 N. Y., 177)."

In *Union Bank vs. Gilbert*, 90 Hun, 417, 419, where the principal issue depended upon the testimony of the plaintiff's cashier, it was *held* upon the authority of *Canajoharie Nat. Bank vs. Diefendorf, supra*, that the truthfulness of the testimony of the cashier was for the consideration and determination of the jury, and not for the Court.

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It is difficult to understand why the trial Court did not refuse to direct a verdict in favor of the plaintiff, upon the note in suit, and upon its own motion, because there was no controversy as to the facts, direct a verdict in favor of the defendant; but it is incomprehensible that the Court should deprive the defendant of his right to go to the jury upon the questions of good faith, and notice to the bank of the infirmity of the paper.

The plaintiff was unable upon the cross-examination of defendants' witnesses to prove a single fact which tended to establish the good faith of the bank, or the existence of any consideration, and utterly failed throughout the entire case to make any showing which could justify the refusal of the trial Court to submit the case to the jury. The defendant was therefore entitled to have the case submitted to the jury.

*American Exchange National Bank vs.  
New York Belting & Packing Co.,  
148 N. Y., 698.*

The rules of law which support the contention of the plaintiff in error are elementary, and should have been readily recognized by the trial Court as applicable to the facts proved upon the trial.

*The circumstances in which the bank took the note in suit are inconsistent with good faith, and until good faith is established there can be no recovery upon the note.*

The said note having been obtained through fraud and without consideration, the *onus* was upon the holder of showing that the bank acquired the same in good faith.

*Am. Exch. Nat. Bank vs. N. Y. B. &  
P. Co., 148 N. Y., 698.  
Grant vs. Walsh, 145 N. Y., 502.*



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### Points.

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- Joy *vs.* Diefendorf, 130 N. Y., 6.  
 Canajoharie Nat. Bank *vs.* Diefendorf,  
 123 N. Y., 191, 205.  
 Vosburgh *vs.* Diefendorf, 119 N. Y.,  
 357, 364.  
 Nickerson *vs.* Ruger, 76 N. Y., 282.  
 Bank *vs.* Carll, 55 N. Y., 441.  
 First Nat. Bank *vs.* Green, 43 N. Y.,  
 298.  
 Daniel on Negotiable Instruments,  
 § 819.

Bad faith may be predicated upon guilty knowledge, willful ignorance and various circumstances surrounding the transaction.

It does not matter whether the cashier of the bank had guilty knowledge of the fraud through complicity with Robinson, or closed his eyes to his duty to the stockholders of the bank and remained willfully ignorant of Robinson's transactions because of his alleged "instructions" from his "superior officers."

In the case of Murray *vs.* Lardner, 2 Wall., 110, Mr. Justice SWAYNE, at page 121, said :

"The rule may be said to resolve itself into a question of honesty or dishonesty, for guilty knowledge and willful ignorance alike involve the result of bad faith."

Chief Justice CHURCH, in the case of Dutchess Co. M. Ins. Co. *vs.* Hachfield, 73 N. Y., 226, at page 228, said :

"Bad faith is predicated upon a variety of circumstances, some of them slight in character, and others of more significance."

Judge ALLEN, in Hall *vs.* Wilson, 16 Barb., 548, at page 550, said :

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"To entitle the holder of negotiable securities which have been fraudulently, feloniously or *without consideration* obtained and put in circulation, to the benefit of this rule (*i. e.*, that of *bona fide*), he must have become such holder in good faith, for a full and fair consideration, in the usual course of business, and without notice of the defect or infirmity in the title."

In Canajoharie Nat. Bank *vs.* Diefendorf, *supra*, RUGER, Ch. J., said at p. 202:

"The requirement of good faith is expressed in the very term by which a holder is protected, and is fundamental in the maintenance of that character (1 Parson's on Bills & Notes, 258)."

See also

Seybel *vs.* National Currency Bank,  
54 N.Y., 288.

This rule is also recognized in England ; see  
Goodman *vs.* Harvey, 4 Ad. & El., 870.

Whether the notice of the fraud to the bank, through its cashier, was actual or constructive, it is equally antagonistic to the claim of good faith. It goes without saying, that if the bank had been informed by the maker of the note that it was without consideration and would not be paid, the bank would not have been a holder in good faith and could not recover. In the case at bar, there were sufficient indications to put the bank upon inquiry, and in the circumstances of this case, as in all others similar to it, "inquiry as to the facts is a moral duty, and diligence an act of justice."

Daniel on Negotiable Instruments,  
§§ 795, 795a.

Angle *vs.* N. W., etc., Ins. Co., 92  
U. S. 342.

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Mr. DANIEL in his work on Negotiable Instruments, says :

§ 795b. *Constructive notice from extrinsic circumstances.* "The circumstances of the transaction may be of such a character as to intimate strongly a defect in the title, and if they are such as to invite inquiry, they will suffice, *provided the jury think* that abstinence from inquiry arose from a belief or suspicion that inquiry would disclose a vice in the paper. Then, indeed, his *bona fides* would be impeached. But further than this, gross negligence, which is not in itself proof of *mala fides*, may be so great as to amount to proof of notice. 'I agree,' says Baron Parke, 'that notice and knowledge mean not merely express notice, but knowledge or the means of knowledge to which the party willfully shuts his eyes.'"

To cite further from Mr. DANIEL's work :

"§ 799. *Particular and general notice.* It is quite clear and well settled that the purchaser need not have notice of the particular fraud, or equity or illegality, in order to be affected by it. It is sufficient that there be notice, actual or constructive, that there is some fraud, or equity or illegality affecting the original parties." \* \* \* If it can be collected by a jury from circumstances fairly warranting such an inference that he knew, or believed, or thought that the bill was tainted with illegality or fraud, such a \* \* notice will \* \* destroy the title" (Citing and quoting from Byles [Sharswood's Ed.], 119, 226).

See also *id.* § 801.

"It will be sufficient if the circumstances are of such a strong and pointed character as necessarily to cast a shade upon the transaction, and to put the holder upon inquiry."

Story on Promissory Notes, § 197.

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"If the circumstances are of such a character as to create a distinct legal presumption and *prima facie* proof of fraud, or of some equity between prior parties, it would operate as legal information and constructive notice to the transferee."

Daniel on Negotiable Instruments,  
§ 796.

See also

*Nat'l Park Bank vs. Remsen*, 43 Fed.,  
226.

In American Exchange Nat. Bank *vs.* New York Belting and Packing Company, 148 N. Y., 698, the Court of Appeals of New York, per GRAY, J. (at p. 705), said :

"In all cases where it is sought to defeat the right of the holder of negotiable paper before maturity to recover against the maker, it is essential that actual notice be proved of the defect in title, or that *circumstances* be shown *evidencing bad faith in the holder and creating reasonable grounds for suspecting his conduct in the transaction.*"

See also

*Witter vs. Sowers*, 32 Fed., 762.

*Loring vs. Brodie*, 134 Mass., 453.

*People's Nat. Bank vs. Clayton*, 66 Vt., 541.

*Palmer vs. Field*, 76 Hun, 230.

*Garfield Nat. Bank vs. Colwell*, 57 Hun, 169.

*Produce Bank vs. Bache*, 30 Hun, 351.

*In re Carew's Estate*, 31 Beav., 39.

Even gross carelessness constitutes evidence of bad faith ; and where it is claimed to exist, the

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question of good faith is for the jury, and is not a question of law for the Court.

Cunningham *vs.* Scott, 90 Hun, 410.

The authorities upon the question of good faith are carefully reviewed in the case of Cheever *vs.* The Pittsburg, etc., R. R. Co., 28 App. Div. (N. Y.), 81, where the Court says (p. 90) :

“ Even where the evidence is not conclusive *if it tends to establish* (italics by the Court), the lack of good faith it should be submitted to the jury; and the jury are authorized to draw such inference from the facts proved as any reasonable view thereof will permit.”

See Hanover Bank *vs.* American Dock & Trust Co., 148 N. Y., 619.

Where a party has knowledge of such facts as would induce a man of ordinary prudence to make further inquiry, a failure to make inquiry is visited with all the consequences of notice.

Wade on Law of Notice, § 11.

The bank is, of course, chargeable with the knowledge of its cashier.

First Nat. Bank *vs.* Blaine, 60 Fed., 78.

Third Nat. Bank *vs.* Harrison, 10 Fed., 243.

Merchants' Nat. Bank *vs.* Tracy, 77 Hun, 443.

Daniel on Negotiable Instruments, § 802.

The Receiver of the bank stands in precisely the same position as the bank.

High on Receivers, § 201.

Cooper *vs.* Bowles. 23 How. Pr., 10.

**Conclusion.**

FOR THE REASONS STATED, it is submitted, therefore, that the judgment of the Circuit Court of Appeals affirming the judgment of the Circuit Court was error, and should be reversed.

FRANK SULLIVAN SMITH,  
Of Counsel for Plaintiff in Error.



*1*  
THE UNITED STATES  
UNITED STATES SUPREME COURT  
COURT DAY, 29, 1890.

DAVID ISRAEL,  
Plaintiff in Error,

CHARLES E. GALE, as Receiver of THE  
ELMIRA NATIONAL BANK (appointed for  
Charles David as Receiver, etc.)

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

DAVID ISRAEL,  
Plaintiff in Error,  
vs.  
CHARLES E. GALE, as Receiver of THE  
ELMIRA NATIONAL BANK (appointed for  
Charles David as Receiver, etc.)

# United States Supreme Court,

OCTOBER TERM, 1898.

GEORGE M. ISRAEL,  
Plaintiff in Error,

*against*

CHARLES F. GALE as Receiver of  
THE ELMIRA NATIONAL BANK,  
(substituted for Charles Davis  
as Receiver, etc.),  
Defendant in Error.

No. 265.

## Brief for Plaintiff in Error.

(The references are to the printed pages of the Record.)

### STATEMENT.

In the month of May, 1893, the plaintiff in error was employed as stenographer and typewriter in the banking house of I. B. Newcombe & Co., in the city of New York. His employers were interested in certain corporations doing business at Elmira, N. Y., of which David C. Robinson was the president. During the absence of both members of the firm said Robinson called at the banking house and stated to the plaintiff in error that he desired some accommodation notes to be made by the clerks of the firm, for the reason that he had exceeded his line of discount and could not get any more accommodation ; that he was building a power-house in

### Statement.

Elmira and needed some money to accomplish that purpose, and that if the plaintiff in error and his fellow clerks would give him the notes which he requested it would enable him to accomplish that purpose. To use the words of the plaintiff in error "he also added that *we would not be put in any position of paying them at any time; that he would take care of them and gave us positive assurance on that point*, and naturally, knowing the man and thinking that he was a millionaire, \* \* \* we had no hesitation about going on the notes. He said it would simply be a temporary matter. At the time I gave the note in suit other notes were given by Mollenhauer and Roll, who were, with me, clerks in the office of I. B. Newcombe & Co" (pp. 10, 11).

The plaintiff in error thereupon delivered to said Robinson his note for \$17,000 dated May 4, 1893, payable *on demand to the order of Elmira National Bank*. The note had no indorsement (p. 10).

The plaintiff in error received no consideration for the execution of the note, either from the Elmira National Bank, the payee named in the note, or from Robinson (pp. 10, 11, 26).

Robinson was a director of the Elmira National Bank, whose capital was \$200,000, and controlled its policy. He, and Bush, the cashier, were the most active of the directors. The Comptroller of the Currency reported to the president of the bank an overdraft in Robinson's account (p. 13). This overdraft at the close of business the day preceding the date of the note was \$35,400.60, and had existed in varying amounts since March 13th, except on two days, when the credits appeared to be about \$5,000, and on April 25th, the overdraft amounted to \$137,400 (p. 20).

The note in suit was in the bank at Elmira May 4th, the day of its date, with like notes made by the two other clerks for \$18,000 and \$19,000 respectively. The cashier left for New York the night of May 4th, and prior to going away directed that the notes be placed to the credit of Robinson's account. This was done May 5th. The following day the cashier telephoned

### Statement.

from New York to the bank ordering the entries of May 5th to be erased and entries as of May 4th to be substituted therefor. This was done (p. 28).

On the morning of May 4th, there was an overdraft of \$35,000 against Robinson on the books of the bank. His account *would have been overdrawn* at the close of business May 4th, *about \$50,000 but for the entry of the proceeds of the notes of the plaintiff in error and his fellow clerks* (p. 28).

The personal notes of Robinson then held by the bank amounted to \$19,000, besides notes upon which he was endorser amounting to \$34,000 (p. 28).

The president of the bank had no knowledge of the discounting of the notes obtained by Robinson from the clerks of I. B. Newcombe & Co. (p. 15).

The cashier had never heard of any of the makers of the notes before May 4th, 1893. He did not ask Robinson "as to the responsibility of the paper" (p. 25). He asked for neither Robinson's indorsement of the notes nor for collateral security for their payment, and yet *he looked to Robinson to pay the notes if the makers did not pay them* (p. 25), and obtained from him *after* the discount of the notes, and *before* payment thereof was demanded, a written guaranty of their payment (p. 27).

When the bank went into the hands of a receiver sixteen days after the proceeds of the notes were passed to Robinson's credit, the aggregate amount of so called "Robinson paper" in the bank was about \$300,000 and the amount of so called "Bush paper," or notes made by members of the cashier's family which had come to the bank through him, was about \$107,000 (pp. 27, 28).

Suit was brought upon the note by the receiver of the bank in the United States Circuit Court for the Southern District of New York, and was tried before Judge Shipman and a jury, resulting in a verdict against the maker of the note by direction of the Court (p. 29).

The defendant objected to the direction of a verdict and

**Point I.**

*The note in suit is void for want of consideration.*

requested to have several questions submitted to the jury which requests were refused, and thereupon duly excepted to each of said rulings of the Court (pp. 28, 29).

The defendant obtained a writ of error to the United States Circuit Court of Appeals from the judgment entered upon said verdict, and upon the affirmance thereof by said Court, a writ of error to this Court was duly granted, and the plaintiff in error in support thereof respectfully presents the following

**ARGUMENT.****I.****The note in suit is void for want of consideration.**

There are but two parties to the note, the maker and the payee, between whom the consideration is open to inquiry.

Byles on Bills, 130.

Bigelow on Bills and Notes, p. 88, §2.

Daniel on Negotiable Instruments, §174.

1. *No consideration passed from the bank, the payee, to the maker of the note.*

There was no business relation whatever between the bank and the maker of the note. The cashier of the bank testified that he first heard of the maker of the note when he first saw the note in suit, at his bank the day of its date; that he had never seen the maker or his fellow clerks prior to the presenta-

**Point I.**

*The note in suit is void for want of consideration.*

tion of their notes ; that he never made any inquiry as to their responsibility from any one else than Robinson (p. 20), and that he had no recollection of asking Robinson as to their responsibility (p. 25).

2. *No consideration passed from Robinson to the maker of the note.*

This was shown by the testimony of the plaintiff in error (pp. 10-11) and of Robinson (p. 26), and the testimony is undisputed.

3. *No consideration passed from the bank, the payee named in the note, to Robinson who obtained and delivered the note to the bank.*

It is apparent from the circumstances surrounding the transaction between the bank and Robinson, that a consideration was not of sufficient importance to be thought of. The discount of \$54,000 of promissory notes—more than one-fourth of the capital stock of the bank—was entered into so lightly by the cashier that the notes were taken without the knowledge of the president of the bank and without action by the loan committee (pp. 15, 19). The sole object of Bush the cashier, and of Robinson the controlling director, was to enable the cashier to report technically to the Comptroller of the Currency the closing of the overdraft in Robinson's account, which, except upon two days, had existed since March 13th, and upon April 25th, had amounted to nearly three-fourths of the bank's capital (p. 20), and which had been the subject of a warning addressed to the president of the bank by the Comptroller of the Currency (p. 13). It is evident that this technical report to the Comptroller of the Currency as to the condition of the bank, by which it must appear whether or not the overdraft was still in existence must be made as of the 4th day of May, 1893. This is true because the entries of the notes made in the books of the bank May 5th were erased by the order of the cashier telephoned from New York, and the entries

### **Point I.**

*The note in suit is void for want of consideration.*

were made as of the 4th day of May (p. 28). The morning of May 4th Robinson's *overdraft was \$35,000*, and but for the entry of the notes at the close of business on that day *the overdraft would have been about \$50,000!* (p. 28).

The cashier cared nothing for the validity of the notes or the responsibility of the makers so long as they served the present purpose of enabling him to stretch his elastic conscience to a point necessary to permit him to report to the Comptroller of the Currency that the Robinson overdraft no longer existed.

The only object and the sole result of the pretended discount of the notes was to lay the false foundation for this report to the Comptroller of the Currency. No real diminution of Robinson's indebtedness to the bank was either intended or effected. This is shown by (1) Robinson's subsequent execution of a guaranty of the payment of the notes bearing the same date, (p. 27), and (2) the testimony of the cashier that although Robinson had not endorsed and had not then guaranteed the payment of the notes he looked to him to pay them (p. 25). No financial consideration can be found in the transaction. It was nothing more than a bookkeeping device concocted between the cashier and the controlling director of the bank in furtherance of a policy which enabled them to pile up in the bank \$300,000 of "Robinson paper" and \$107,000 of "Bush paper"—aggregating an amount more than double the capital of the bank—and to postpone for their own advantage its ultimate disastrous ruin. The transaction lacked the elements essential to consideration. It was necessary that the apparent purchase be a purchase in fact and not a mere bookkeeping entry.

*"Mere discount and credit do not of themselves constitute a bona fide purchaser for value. To occupy that position the holder must actually have parted with something of value for the note."*

Daniel on Negotiable Instruments, § 779c.

At the time of making the entry of the note upon its books,

### Point I.

*The note in suit is void for want of consideration.*

the bank parted with nothing and gave to Robinson only a valueless credit. At the moment that the note was discounted, and at all times thereafter, the bank looked to Robinson to pay the notes and he carried out the understanding that his liability should not be lessened by executing a written guarantee of their payment. There was not only an absence of agreement that the notes should be received in payment or extinguishment *pro tanto* of Robinson's indebtedness to the bank, but on the contrary it appears that after taking the notes the bank could enforce the original claim against Robinson, and that it was in precisely the same condition as it would have been had it not received the notes. Neither was there any indulgence or forbearance granted to Robinson.

This was clearly insufficient to establish a consideration between Robinson and the bank.

Randolph on Commercial Paper, § 466 ;  
 Byles on Bills, p. 128 ;  
 Edwards on Bills and Notes, § 452 ;  
 Parsons on Notes and Bills, p. 196 ;  
 Platt *vs.* Chapin, 49 Barb., 318 ;  
 Thompson *vs.* Sioux Falls Nat. Bank, 150 U. S., 231 ;  
 Hume *vs.* The Howe Machine Co., 54 Conn., 394 ;  
 Dresser *vs.* M. & I. R. R. Co., 93 U. S., 92 ;  
 Manufacturers Nat. Bank *vs.* Newell, 71 Wis., 312.  
 See also other cases cited on pages 31 and 32 of the principal brief for plaintiff in error.

Randolph in his work on Commercial Paper at § 466, above cited says :

"A debt already contracted and due from one person was no sufficient consideration for a note by another. Unless it be taken in satisfaction or unless credit have been given to the original debtor at the maker's request.

\* \* \* \* \*

In general a note *payable in future* for a debt of a

### Point I.

*The note in suit is void for want of consideration.*

third person already due amounts, as we have seen, to indulgence as to the latter debt and has in that a sufficient consideration. But a note which is given for a debt of another simply, and without indulgence, is without consideration and will not bind the maker, *although credited on such debtor's account.*"

In *Bingham vs. Kimball*, 17 Ind., 396, a note was given by the defendant for lumber *previously furnished* to the State Board of Agriculture; it was held that the contract was *nudum pactum*. Citing:

*Leonard vs. Vredenburgh*, 8 Johns., 29, 39;  
*Smith on Contracts*, p. 119, 4th Am. Ed.;  
*Browne on Statute of Frauds*, § 191;  
*Birkmyr vs. Darnell*, 1 *Smiths' Leading Cases*, p. 287, and note;  
*Tyner vs. Stoops*, 11 Ind., 22.

In *Stoudenmire vs. Ware*, 48 Ala., 589, it was held that a promissory note given for the debt of another, on the assurance of the payee that the agent of the debtor will pay it on request, but without the knowledge or assent of such debtor or his agent, is without consideration, notwithstanding the note is made payable some time after the transaction, and the claim against the debtor is received and delivered to the maker.

In the case of *Crofts vs. Beale*, 11 C. B., 172, Wm. Beale, the defendant, showed that one John Beale was indebted to the plaintiff in the sum of £1,000 and that, being pressed for payment, and a writ having issued against him at the suit of the plaintiff, he and the defendant gave the plaintiff their joint and several note, being the note declared on.

*JERVIS, C. J.*, said in reply to the suggestion that the note might have been given in consideration of a former agreement: "We cannot assume that there was any consideration other than that stated in the plea."

In *Byles on Bills*, 6th Edit., p. 96, note p., it is said that, 'if a note be payable immediately it is conceived that the present pre-existing debt of a stranger would not be consideration, unless credit had been given to the original debtor at the maker's request.' "

The jury having found that there was no other consideration than above stated it was held that the plaintiff could not recover.

### Point I.

*The note in suit is void for want of consideration.*

"Although the note of a third party is made directly payable to the creditor, without signature or indorsement of the debtor, and is credited on account, it will not be a payment if it has not been received as such. Making the note payable directly to the creditor does not change its character as a conditional payment only, without an agreement to that effect."

Randolph on Commercial Paper, § 1546.

In the case of *Puget de Bras vs. Forbes & Gregory*, 1 Espinasse, 117, the defendants gave a third party purchasing bills for the plaintiff their bill of exchange against them as drawers. The money for the bill was in the hands of the third party, who failed before paying for the bill.

Lord LOUGHBOROUGH held that the plaintiff could not recover because he was subject to all the equity the defendants could have had against the party negotiating the bill, if the bill had been drawn payable to that party.

In *Thomas vs. Thomas*, 2 Q. B., 859, PATTESON, J., says:

"A consideration means something which is of some value in the eye of the law moving from the plaintiff. It may be of some benefit to the defendant or some detriment to the plaintiff, but at all events it must move from the latter."

4. *The note of the plaintiff in error was not available for the use made of it by Robinson and the bank without the consent of the maker.*

There were two implied conditions imposed upon Robinson by the plaintiff in error when he delivered to him the note in suit. These conditions were that (1) the note was to be used in obtaining money for use in building a power-house for the corporation in which I. B. Newcombe & Co. were interested, and (2) Robinson was to "take care of the note," and the maker was not to be called upon to pay it (pp. 10, 11).

In view of these restrictions upon the use of the note which was made payable to the bank without indorsement by Robin-

### Point I.

*The note in suit is void for want of consideration.*

son, the bank is not entitled to the character and privilege of a *bona fide* holder of the note.

It is apparent from Robinson's testimony that he concealed from the makers of the notes the use to which they were to be put, and that notwithstanding what he assigned as his reasons for asking for the notes he obtained them for the sole purpose of aiding the cashier of the bank to conceal his overdraft (p. 26).

Bigelow in his work on Bills and Notes (Students' Edition), pp. 221, 222, says:

"To make a man such ("bona fide holder for value") as regards the defendant, with the *special* rights of the position, there must have intervened between the two at least one holder. And ordinarily such a holder is an indorsee; \* \* \* where there has been no intervening holder, the plaintiff and defendant are called immediate parties, and any defense is open which would be open to an action upon an ordinary simple contract in writing; the doctrine in regard to equities has no application to such a case."

RANDOLPH, in his work on Commercial Paper, says, § 466:

"Where two persons give a draft for the debt of one of them to a third person, with an agreement that one of the drawers shall not be held liable, it has been held that he can avail himself of this agreement, and establish a want of consideration thereby in a suit brought against him by the payee of the draft."

In the same section the author says, citing Crofts *vs.* Beale, *supra*: "A debt already contracted and due from one person, was no consideration for a note by another, unless it be taken in satisfaction or unless credit have been given to the original debtor *at the maker's request.*"

See also § 1546, quoted *supra*.

That there was no such request is established by the testimony of the plaintiff in error (pp. 10, 11,) Bush, the cashier of the bank (p. 20), and Robinson (p. 26).

### Point I.

*The note in suit is void for want of consideration.*

The note of the plaintiff in error could not be used for the payment *pro tanto* of Robinson's debt to the bank without the maker's consent.

Spencer *vs.* Ballou, 18 N. Y., 327 ;  
 Toby *vs.* Barber, 5 Johns., 68 ;  
 Raynor *vs.* Land, 28 Hun, 35 ;  
 Potts *vs.* Mayer, 74 N. Y., 594.

In the case of Ellis *vs.* Clark, 110 Mass., at page 392, GRAY, J., says :

"The defendant, as the jury were rightly instructed, having put his name on the note after it had been delivered to the plaintiff, and not as part of the original contract, could not be held liable without proof of some new and independent consideration. That consideration need not be a benefit to the defendant. Any loss or disadvantage to the plaintiff, by giving up some right against a third person, or agreeing to abandon or delay enforcing some right against him, would be sufficient. But the consideration or motive of the promise *must be known to the promisor*. *The minds of the parties must meet and agree upon the terms of the whole contract, including the promise on the one side and the consideration for it on the other.*"

See also Pratt *vs.* Hedden, 121 Mass., 116.

The payee, not being a *bona fide* holder under the law merchant, the plaintiff in error is entitled to show as a good defense that the delivery of the note was conditional, as well as that the note was without consideration.

Higgins *vs.* Ridgway, 153 N. Y., 130 ;  
 Benton *vs.* Martin, 52 *id.*, 570 ;  
 Bookstaver *vs.* Jayne, 60 *id.*, 146.

**Point II.****II.****The bank acquired no title to the note which can be enforced against the maker.**

The cases cited by the learned Judge who delivered the opinion of the Circuit Court of Appeals in support of the judgment of the trial Court are not analogous to the case at bar, and the contention of the plaintiff in error is not opposed to those decisions.

In *Swift vs. Tyson*, 16 Peters, 1, the bill of exchange in suit was *indorsed* to the plaintiff in *payment* of a promissory note due to him. The plaintiff was a *bona fide* holder of the paper, without notice, and for a consideration, which although it was a pre-existing debt, the Court held to be good. But in the case now before the Court the paper in suit is without indorsement between the maker and the payee, and there was no *payment* of any debt, either concurrent or pre-existing by means of the note. The relation of Robinson to the bank as its debtor was not changed, and the bank parted with nothing either to him or to the maker of the note.

In *National Bank of the Republic vs. Brooklyn C. & N. Ry. Co.*, 14 Blatchf., 242, affirmed by this Court, 102 U. S., 14, the note in suit was pledged to the plaintiff as collateral security for a loan. In giving the opinion of the Court upon affirmance Mr. Justice HARLAN lays stress upon the fact that the note came to the bank so indorsed that the bank became a party to the instrument, and that the bank received it under an obligation to present it for payment and give notice of non-payment, and this was a sufficient consideration to protect it against equities existing between the other parties *of which it had no notice*. Mr. Justice HARLAN says, page 27:

"It (the bank) assumed the duties and responsibilities of a holder for value, and should have the rights and privileges pertaining to that position. \* \* \*

If the bank was deceived as to the real ownership of the paper, or as to the purposes of its execution and delivery to Hutchinson & Ingersoll, it was because the railroad company intrusted it to those parties in a form which indicated that the latter were its rightful holders

### Point II.

*The bank acquired no title to the note.*

and owners, with absolute power to dispose of it for any purpose they saw proper.

Our conclusion, therefore, is that the transfer, before maturity, of negotiable paper, as security for an antecedent debt merely, without other circumstances, *if the paper be so indorsed that the holder becomes a party to the instrument*, although the transfer is without express agreement by the creditor for indulgence, is not an improper use of such paper, and is as much in the usual course of commercial business as its transfer in payment of such debt. In either case, the *bona fide* holder is unaffected by equities or defenses between prior parties, of which he had no notice."

In the case of *Mohawk Bank vs. Corey*, 1 Hill, 513, the plaintiff bank took the note in suit indorsed by the defendants before maturity in *payment* of other notes of the maker, indorsed by another, which the bank gave up and discontinued a suit thereon then pending. The Court held this to be a sufficient parting with value to entitle the plaintiff bank to the rights of a *bona fide* holder. BRONSON, J., in giving the opinion of the Court, said, page 515: "If the note had been made for the purpose of taking up another note in the Albany City Bank, to which the indorsers were parties, it would have presented a different question."

It is difficult to discover the analogy between the case at bar and *Mohawk Bank vs. Corey, supra*.

The remarks of the learned Judge who delivered the opinion of the Circuit Court of Appeals upon the rules governing accommodation paper, are not applicable to an instrument that lacks the intervention of a third party upon the instrument and deprives the party attempting to enforce it of the character of a *bona fide* holder.

Cases presenting much closer analogy to the case at bar than those cited by the learned Circuit Court of Appeals will be found in *Bradshaw vs. Miners' Bank of Joplin*, 81 Fed. Rep., 902; *Hagan vs. Bigler*, 49 Pac. Rep., 1011; *Dowden vs. Cryder*, 55 N. J. L., 32; *Vorce vs. Rosenbury* 12 Neb., 448; *Messmore vs. Meyer*, 56 N. J. L., 31; *Downes vs. Richardson*, 5 Barn. & Ald., 657, and *Crofts vs. Beale*, 11 C. B., 172, in

**Point III.**

*The maker was not bound by the use made of the note.*

which there is a closer similarity of facts to the case at bar, and in which the Courts arrived at conclusions opposed to that which was reached in this case by the Circuit Court of Appeals.

**III.****The maker of the note was not bound by the use made of it.**

Robinson, not being a party to the note, acted either as a messenger or as an agent of either the payee or the maker of the note. If his relation to the transaction was that of a messenger between the parties, certainly nothing was done to give validity to the *nudum pactum* between the maker and the payee. If he was an agent of the bank his knowledge that the note was without consideration bound his principal. If he was the agent of the maker of the note he was bound by the terms of his agency, which in no wise included or implied the right to make the use of the note to which Robinson put it.

The facts in the case of *Messmore vs. Meyer*, 56 N. J. L., 31, are so similar to the facts in the instant case and the reasoning of the Court so appropriately applies to the case at bar, that the attention of this Court is respectfully called to the discussion thereof on pages 21 and 22 of the principal brief for plaintiff in error.

**Point IV.****IV.**

**The trial Court erred in directing a verdict in favor of the receiver of the bank and against the maker of the note, and in refusing to submit to the jury the question of the bona fides of the bank.**

Sufficient reasons have already been stated in the preceding points of this argument to establish the error of the trial Court in directing a verdict upon the note in suit.

But aside from the error involved in directing a verdict, had there been no motion for the direction of a verdict before the Court, the plaintiff in error was entitled to have the question of the good faith of the bank passed upon by the jury in a transaction in which the testimony of the cashier of the bank "shows his conduct to have been *unusual, imprudent* and *inconsistent* with the character which he seeks to maintain as a *bona fide holder*."

Canajoharie Nat. Bank *vs.* Diefendorf, 125 N. Y., 191, 206.

The facts shown in the Record relating to the conduct of the bank, and the attitude of Bush, the cashier, and Robinson, the principal or "controlling" director, toward the bank and toward each other were forced from unwilling witnesses, who, if they admitted too much, might be proceeded against criminally, and who would naturally endeavor to appear to have acted in good faith. Yet in reading the testimony of Bush and Robinson one finds enough to lead to the conviction that Bush as well as Robinson knew that the paper of the plaintiff in error and his fellow clerks was worthless, and that its only value to those who were trying to prevent for a little longer the fall of the structure which they had undermined, was to enable them to deceive the Comptroller of the Currency, and thus obtain temporary immunity and perhaps ultimate

### **Point IV and Conclusion.**

safety from the result of the wrong which they had committed.

In the circumstances, it was for the jury to say whether the cashier, whose knowledge was that of the bank (*Daniel on Negotiable Instruments*, § 802), had not notice of all the facts attending the delivery of the notes to Robinson and their use by him.

*Daniel on Negotiable Instruments*, §§ 795b, 799.

*Byles on Bills* [Sharswood's Ed.], 119, 226.

See also cases cited under Point Fourth of the principal brief for plaintiff in error.

### **Conclusion.**

#### **The judgment should be reversed.**

It appears upon the Record that the notes of the plaintiff in error and his fellow clerks are worthless, and it may be thought that neither the prosecution nor the defense of suits upon those notes is of sufficient importance to engage the attention of the Courts. But it is reasonable that the young men who made their notes without receiving any benefit therefrom relying upon the assurance of a man they believed to be a millionaire (p. 11) that "he would take care of" the notes, should attempt to prevent the rendition of judgments against them in the hope of better days. To enforce these notes in the circumstances of their creation and use, is not only opposed to the rules of commercial law, but is "repugnant to the morals of the times" in making it easy for those to whom important trusts are committed, to impose upon the public by devices that are abhorrent to honest men.

It is, therefore, respectfully submitted that the judgment of the Circuit Court of Appeals affirming the judgment of the Circuit Court should be reversed.

DAVID WILLCOX,  
FRANK SULLIVAN SMITH,  
Of Counsel for Plaintiff in Error.

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Brief of Bissell for D. C.

Supreme Court of the United States

*Filed April 7, 1899.*

OCTOBER TERM, 1898.

APRIL 4, 1899.

MILES H. MCKENNEY,

Clerk.

GEORGE M. ISRAEL,

*Plaintiff in Error,*

v.

CHARLES P. GALE, as Receiver of The  
Elmira National Bank (substituted for  
Charles Davis, as Receiver, etc.)

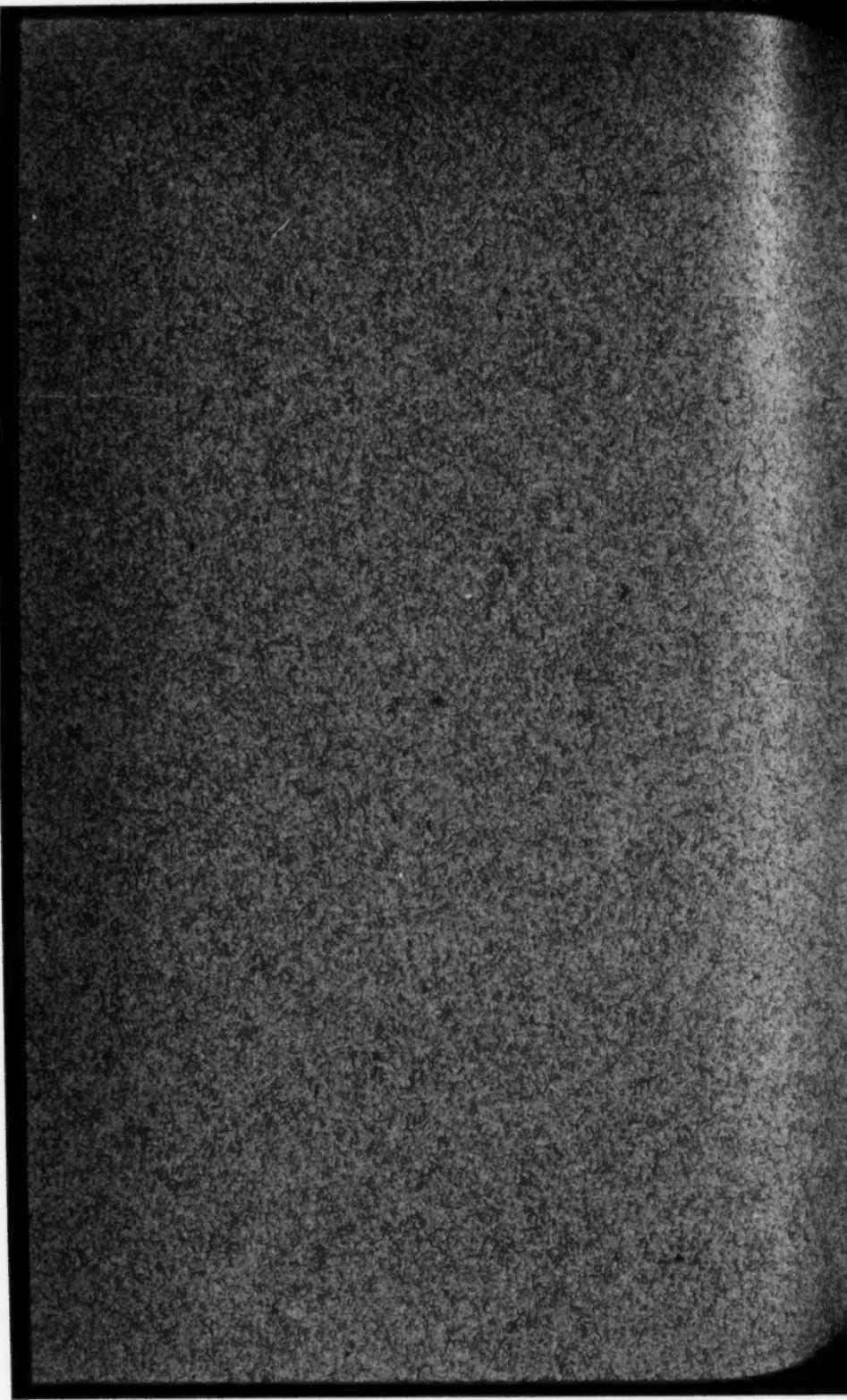
No. 285.

*Defendant in Error.*

Brief for the Defendant in Error.

WILSON S. BISSELL,  
MARTIN CAREY,

*Of Counsel for Defendant in Error.*



# United States Supreme Court.

OCTOBER TERM, 1898.

GEORGE M. ISRAEL,

*Plaintiff in Error,*

vs.

CHARLES F. GALE, as Receiver of the  
ELMIRA NATIONAL BANK, (sub-  
stituted for CHARLES DAVIS, as  
Receiver, etc.),

*Defendant in Error.*

## Brief for Defendant in Error.

(The references are to the printed pages of the  
Transcript of Record.)

### STATEMENT OF FACT.

The unsatisfactory character of the statement of fact contained in the brief for the plaintiff in error, and the unwarranted deductions from the evidence therein contained, would seem to render it appropriate for the defendant in error to make what seems to him a more accurate statement of the case.

The defendant below, George M. Israel, of New York City, at the request of one David C. Robinson, of Elmira, N. Y., made and delivered to Rob-

**STATEMENT OF FACT.**

inson the promissory note in question (pages 10 and 11, Transcript of Record).

On the fourth day of May, 1893, the note was presented at the Elmira National Bank by Robinson, and at his request was discounted by the cashier, and the proceeds placed to his credit (pp. 14, 18, 19, 20 and 25).

Robinson, at that time, was a director of the bank, a very prominent and reputable citizen of Elmira, engaged in many large and important enterprises, and reputed and believed to be a man of great wealth and financial responsibility (pp. 11, 14, 25 and 26).

When the paper was presented to the cashier he was informed by Robinson that the makers "were able to pay the notes" (p. 20), and at the same time was shown a letter by Robinson, which created the impression upon him that the notes had come from I. B. Newcombe & Co., a firm of reputable and responsible bankers of New York, with whom the cashier knew Robinson to have had previous dealings (pp. 10, 21 and 23).

As a matter of fact, it transpired on the trial that the maker of the note, George M. Israel, was at the time a typewriter in the office of I. B. Newcombe & Co., and was not then, nor is he now, a man of any property or financial responsibility (p. 10). Of which, however, neither the cashier nor the bank had any knowledge (pp. 20, 21, 23 and 24).

Robinson was very prominent, a leading member of the bar, a director in the bank, believed to be a very rich man of high personal character, was Mayor of the City at the time, President of the

**STATEMENT OF FACT.**

Elmira Municipal Improvement Company, which owned everything in the way of public improvements in and about the City, including the water works, electric lighting plant, etc., etc., and was necessarily using large sums of money (pp. 11, 14, 25, 26 and 27); and when the notes in question were presented, they were discounted and placed to Robinson's credit, by the cashier, just as he would have done in the case of any other equally reputable and responsible customer (p. 25), and just as had frequently been done before (p. 25), and pursuant to the general instructions received from the officers of the bank (pp. 23, 24 and 25).

Subsequently, and on or about the 23d day of May, 1893, the Elmira National Bank failed (p. 18) and the predecessor of the present receiver was appointed receiver by the Comptroller of the Currency, and finding this note among the assets of the bank, brought this action to recover thereon (pp. 2, 3 and 4).

The answer sets up as defenses substantially :

1st. That the defendant received no consideration for the note (p. 6).

2d. That it was applied in payment of an antecedent indebtedness to the bank arising out of an overdraft (p. 7).

3d. That it was a mere subterfuge for the obtaining of money from the bank contrary to the limit prescribed by law (p. 7).

4th. That the maker was merely a straw man of no financial responsibility, and expected Robinson to take care of the note himself (p. 7).

#### STATEMENT OF FACT.

5th. "That he had no knowledge, at the time he delivered said note to said Robinson as aforesaid, *how said note was to be used by said Robinson*," but "*believed that said Robinson would make said note good and of value, either by securing a good endorsement to the same, or by depositing good collateral therewith, in case said note was used at all by said Robinson*" (pp. 7 and 8).

6th. That the bank had guilty knowledge of all the facts alleged.

Upon the trial, the defendant testified: "I had a conversation with D. C. Robinson, at the time of the making of the note. He stated to me the object or purpose for which he desired the note. *He stated to me that he desired some accommodation notes and he wanted us clerks to make them, and stated the amount. He said that the reason he wanted the accommodation notes was that he had exceeded his line of discount and could not get any more accommodation; that he was building a power house up there (in Elmira) and needed some money to accomplish that purpose, and if we would give him these notes it would enable him to accomplish that; he also added that we would not be put in any position of paying them at any time; that he would take care of them and gave us positive assurance on that point, and, naturally knowing the man and thinking that he was a millionaire, as he probably was at that time, we had no hesitation about going on the notes. He said it would simply be a temporary matter. At the time I gave the note in suit, other notes were given by Mollenhauer and Roll, who were with me, clerks in the office of I. B. Newcombe & Co.*"

### STATEMENT OF FACT.

Upon this testimony there was a further claim that the note had been diverted from its original purpose, and that having been applied to the payment of an antecedent indebtedness, the plaintiff not being a holder for value, could not recover.

The "antecedent indebtedness," upon which great stress is laid by the plaintiff in error, was an overdraft which, at the close of business on the night of May 4, 1893, appeared by the books of the bank to amount to about \$35,000 (p. 20).

At times prior to that date, the books showed overdrafts of a larger amount, but the correctness of the amount was a matter of dispute between the bank and Robinson, who claimed that certain large items had been improperly charged to his account (pp. 20 and 21). As to which was right in this dispute the testimony does not disclose.

The plaintiff in error insists that the proceeds of the note in suit and the others given at the same time, amounting in all to \$54,000, were applied to the payment of the overdraft in question; but this claim not only has no evidence to support it, but is in direct conflict with the only testimony in the case upon the question of the application of the proceeds of the notes referred to.

Upon this point the only testimony is that of Robinson at the bottom of page 26, where he says: "The amount of *other* notes wiped out the overdraft and made a balance," and that of Edson the book-keeper at page 28, where he says: "There were items coming through the exchanges that amounted to about \$73,000, and there was a deposit made of \$33,000 to make the overdraft good.

**STATEMENT OF FACT.**

*These were to take up the items that came through the exchanges."*

These notes were therefore duly and regularly discounted, the proceeds in cash placed to the credit of Robinson in the usual manner, and were paid out by the bank in cash upon such new items as were presented in the usual course of business.

At the close of the testimony, the plaintiff below made a motion for a direction of verdict for the full amount of the note with interest, which was granted.

The conclusions stated in the "summary of facts," set forth on pages 9, 10 and 11 of the brief for the plaintiff in error, and alleged to have been adduced from the undisputed evidence given upon the trial, are, with one or two immaterial exceptions, utterly unwarranted and without support in the evidence. This will conclusively appear by even a casual examination of those portions of the testimony referred to in the brief to support the conclusions therein enumerated. In order, therefore, that the defendant in error may not be thought to have acquiesced in the correctness of the conclusions in question, the following

**SUMMARY OF FACTS.**

is believed to more accurately state the conclusions properly deducible from the evidence in the case.

1. The note in suit was payable to the order of the Elmira National Bank and was without endorsement (p. 3).

2. The said note was made and delivered by the maker to Robinson without consideration, of

**SUMMARY OF FACTS.**

which, however, the bank had no knowledge, but was delivered by Robinson to the bank for full and adequate consideration (pp. 21, 26 and 28).

3. The said note was made and delivered to Robinson to enable him to procure further accommodation at the bank, but was otherwise without restriction (pp. 10 and 11).

4. The said note was used for the purpose for which it was given (pp. 20, 26 and 29).

5. The total deposits made May 4, 1893, were upwards of \$112,000, leaving a balance of about \$4,000 to Robinson's credit after paying up the overdraft and all new items that came through the exchanges during the day (p. 28).

6. The said note was discounted in the usual course of business at the request of Robinson, who at that time was a very prominent and influential citizen of Elmira, and believed to be a man of great wealth and integrity, and upon his assurance that the maker was responsible and able to pay (pp. 20 and 25).

7. The bank parted with full value upon receiving said note, and placed the proceeds thereof in cash to the credit of said Robinson upon the books of the bank (pp. 20, 26 and 29).

8. At the time the bank took said note, inquiry was made of Robinson as to the maker, and assurances were received from him as to his responsibility (pp. 20, 21, 23 and 25).

9. The maker knew whether he had received any consideration from Robinson, and he knew

**SUMMARY OF FACTS.**

where the note was to be used; the bank did not know that no consideration had passed from Robinson to the maker; and in the absence of any notice from the maker, when the note was presented by a man of Robinson's wealth and standing, the bank had a right to assume that the maker, before the delivery to Robinson had received value for the note and to act upon that assumption (pp. 10, 11, 20, 21, 23, 24 and 25).

10. At the time the bank discounted said note, Robinson had procured to be discounted other paper amounting to about \$300,000 and paper to the amount of about \$107,000 had been discounted for the benefit of members of the family of the cashier, all of which paper, without exception, so far as the testimony discloses, was gilt edged commercial paper, upon which the bank never lost a single dollar (pp. 27 and 28).

11. Robinson, while he was a director of the bank, occupied no other official relation toward it; was not a member of the finance committee; did not have charge of any particular branch of the business, and neither had nor exercised any control over the policy of the bank, other than as a member of the board of directors, and in the transaction in question, acted entirely for himself and his own individual interests, and in no particular for the bank (pp. 12, 14, 25 and 26).

## POINTS.

### I.

**The evidence presented no question requiring the submission of the case to the jury.**

An examination of the New York authorities rather than the testimony in this case is evidently responsible for the erroneous theory of the learned counsel for the plaintiff in error that the note, being accommodation paper, was given by the maker for a specific purpose, from which it was diverted, and applied to the payment of an antecedent indebtedness.

Having adopted this rule of law, its application was only possible by assuming a state of facts having no support in the evidence.

**(a) The note was not diverted.**

From the testimony of the plaintiff in error may be adduced his own theory as to the purpose for which the note was given.

At the bottom of page 10, he testifies as follows;

"He stated to me that he desired some accommodation notes and he wanted us clerks to make them, and stated the amount. He said that the reason he wanted the accommodation notes was that he had exceeded his line of discount and could not get any more accommodation; that he was building a power house up there (in Elmira) and needed some money to accomplish that purpose, and if we would give him these notes, it would enable him to accomplish that." This testimony is not subject to the narrow construction sought to be placed upon it by the

**POINTS.**

1. *The evidence presented no question requiring the submission of the case to the jury.*

(a.) *The note was not diverted.*

plaintiff in error. Robinson told him that he had exceeded his line of discount, and could not get any more accommodation. What he wanted was further accommodation. The method of accomplishing his purpose was not explained, nor did the maker require any explanation, or care what method was pursued. If any doubt of this existed, it would be dispelled by the statement contained in the amended answer, on page 7 of the printed Transcript of Record, as follows: "The defendant alleges that he had no knowledge at the time he delivered said notes to said Robinson as aforesaid, *how said note was to be used by said Robinson.*" Israel had no intention of conveying the impression in his testimony that the specific proceeds of the note were to be applied to the building of the power house, and does not say so; and the most that can be deduced from his evidence in favor of his counsel's theory, is that Robinson was at liberty to use the notes, either for the purpose of paying up his overdraft, or in any other way that would result in further accommodation to him at the bank, through which he might procure additional funds. It certainly cannot be contended that it was the duty of the bank to see to it that such additional fund as might result from the transaction, should be applied to the building of the power house, or any other specific purpose; and yet the effect of the position assumed by the plaintiff in error, is that it was the

**POINTS.**

*1. The evidence presented no question requiring the submission of the case to the jury.*

(a.) *The note was not diverted.*

bank's duty whenever a check was drawn against the fund, to inquire the purpose for which the check was given, before honoring it. "If we would give him these notes, it would enable him to accomplish that;" that is, having exhausted his line of discount at the bank, and being indebted to the bank, he was unable to raise further funds for any purpose, and if they would give him these notes it would enable him, not necessarily to create a fund to be exclusively devoted to the building of the power house, but, to pay up his overdraft, or other indebtedness to the bank, or otherwise place himself in such a position with the bank that it would be willing to extend to him further accommodations. The payment of his antecedent indebtedness to the bank, so as to entitle him to new accommodations, the proceeds of which might be used in the building of the power house would just as conclusively meet even the technical construction contended for by the counsel for the plaintiff in error, as if an entirely new fund had been created to be specifically applied to that purpose.

Israel had no conceivable motive for restricting the note as contended for by his counsel. He had no interest in the power house; he was a person of absolutely no financial responsibility; did not expect to be called upon to pay the note, but expected Robinson, whom he believed to be a millionaire, to take care of it at the proper time, and he was

**POINTS.**

1. *The evidence presented no question requiring the submission of the case to the jury.*

(a.) *The note was not diverted.*

therefore in no wise interested in the purpose to which the note was to be put or how it was to be used. He knew nothing could be collected from him, and rather prides himself on that fact.

His counsel, recognizing how absurd would appear the claim that Israel had carefully restricted the purpose of the note, in the absence of any possible motive for so doing, couples the statement of the purpose with the further statement to be found at page 10 of his brief, subdivision 3 of his summary of facts, as follows: "Presumably for the benefit of the properties in which the maker's employers were interested." This latter is a mere insinuation without a shadow of support in the evidence. Pages 10, 11 and 23 are referred to in support of this statement. Pages 10 and 11, which are Israel's own testimony, do not contain a word on this subject. Page 23, which is a part of the cashier's testimony, contains nothing from which any such inference can be drawn. Bush testified that I. B. Newcombe & Co. and Robinson "had had dealings in the past in the transfer of this property," and had been "interested with one another," and explains, on the same page, that their relations were merely those of broker and client, and says that they had no other transactions for some time. This same unwarranted statement is persisted in on page 4 of the brief for the plaintiff in error, and seems to be persistently and delib-

**POINTS.**

1. *The evidence presented no question requiring the submission of the case to the jury.*

(a.) *The note was not diverted.*

erately made for the purpose of creating the impression that Israel was unwilling to give Robinson the benefit of his financial standing and responsibility, except upon the condition that the proceeds of his note were to go into a building in which the faithful servant's employers were financially interested. Israel, himself, did not know they were interested, does not even hint that he ever suspected such a thing, or cared whether they were or not, or that he was actuated in the slightest degree by any such motive. The evident purpose in this attempt to wrest the testimony from its plain meaning, is to bolster up the fanciful theory that the note was given for a specific purpose, from which it was diverted, and is a mere perversion of the facts to fit certain New York authorities which would otherwise have no possible application. He knew from what was told him that Robinson was indebted to the bank; he made the note directly to the bank, and, therefore, knew it was to be used at that bank. He knew that the reason Robinson could not get further accommodation was because he was indebted to the bank, and that the existing indebtedness would have to be paid before new accommodation would be extended; under such circumstances he gave the note, and now he complains because he says the note was used at the very place and for the very purpose for which he knew it was required by Robinson.

**POINTS.**

1. *The evidence presented no question requiring the submission of the case to the jury.*

(a.) *The note was not diverted.*

The cases cited by plaintiff in error were either where the holder knew of the fraudulent diversion, as in Benjamin vs. Rogers, 126 N. Y., 70, or where the diversion of the note injuriously and prejudicially affected the accommodation maker or indorser, as in U. S. National Bank vs. Ewing, 131 N. Y., 506.

In this latter case the accommodation indorser indorsed the note upon the express assurance of the maker that it would only be used in Kentucky and not in this State.

He evidently considered that a use of the note in this State might injuriously affect his credit and financial standing and imposed the condition for his protection. The note was diverted and transferred to the plaintiff, a bank of this State, as *collateral security for a precedent debt*, and for that reason the plaintiff was held not to be a *bona fide* holder for value.

But, as will be hereafter seen, the Supreme Court of the United States holds under such circumstances that the bank *was a bona fide* holder for value.

In the present case there was no diversion, nor was anything done or attempted by which it was possible to affect the maker prejudicially.

The note effected the substantial purpose for which it was designed, in which event, even under the technical rule in New York, it could not be held a diversion.

**POINTS.**

1. *The evidence presented no question requiring the submission of the case to the jury.*

(a.) *The note was not diverted.*

"Where a note has effected the substantial purpose for which it was designed by the parties, an accommodation endorser cannot object that it was not effected in the precise manner contemplated at the time of its creation."

Wardell vs. Howell, 9 Wend., 174 and cases cited.

Mohawk Bank vs. Corey, 1 Hill, 513.

Powell vs. Walters, 17 Johnson, 176.

Bank of Rutland vs. Buck, 5 Wend, 66.

Daniel on Negotiable Instruments, Sec. 793.

"But where the use made of it is consistent with the object for which it may have been executed, any valid consideration will be sufficient to sustain an action upon it by the holder."

Grocers' Bank vs. Penfield, 7 Hun, 284.

Plaintiff in error cites Daniel on Negotiable Instruments, sec. 791, but does not give the language of the text, which is: "*The rule in New York is different, and there it is held that a diversion is such fraud as to shift the burden of proof upon the holder.*" What is meant is that the New York rule differs from the rule laid down in the text; for in the preceding section the following proposition is laid down: "*The defense must not only show that the paper was diverted from its purpose, but also that such diversion was known to the holder*

**POINTS.**

1. *The evidence presented no question requiring the submission of the case to the jury.*

(a.) *The note was not diverted.*

when he received it, *misapplication not being such fraud as shifts the burden of proof.*" Citing numerous authorities. And then in Sec. 791, after citing the more technical New York rule, the author adds: "But the principle of the text is, we think, in conformity with the current and weight of authority, and the true theory of the law merchant."

"Nor will proof that it was given for the debt of another, nor proof of mere misapplication of the instrument, where it has subserved its substantial purpose, shift the burden of proof, as has been already indicated; though in New York it is otherwise considered."

Daniel on Negotiable Instruments, Sec.  
814.

The cases cited in support of the text include many decisions of the Supreme Court of the United States.

The case of Messmore vs. Meyer, 56 N. J. L., 34, has no application here, because in that case the maker gave the note to a third person named Simmons for the accommodation of Simmons and the plaintiff and took back a written receipt stating that fact.

Of course, the plaintiff was bound by the written receipt and estopped from denying the purpose for which the note was given.

**POINTS.**

1. *The evidence presented no question requiring the submission of the case to the jury.*

(a.) *The note was not diverted.*

If the note here were given for the accommodation of the bank, then the authority in question might apply.

At the close of the opinion in the Messmore case the true distinction is recognized by the Court: "It is unnecessary to determine what plaintiff's rights might have been, had defendants made this note for an indebtedness due from them to Simmons, or as an accommodation to Simmons alone."

The counsel for the plaintiff in error cites the case of Bradshaw vs. Miners' Bank, 81 Fed., 902, as authority to show that the circumstance of this note being made payable directly to the Elmira National Bank, instead of to Robinson and by him endorsed to the bank, permits Israel to introduce defenses not otherwise competent to him. It is not perceived how this affects the case further than to show notice to the bank, perhaps, that the note was accommodation paper. The facts in the Bradshaw case differ widely from those here. Briefly, they were that a Zinc Company had sold goods to Bradshaw, who gave therefor, at the request of the Zinc Company, notes payable to the Miners' Bank, as agent or trustee for the Zinc Company. The bank had no beneficial interest in the notes. The goods sold to Bradshaw proved not to be as represented, and it was held Bradshaw could allege this as a defence when sued on the notes. Of course, this was the same as allowing Bradshaw to defend against the fraudulent Zinc Company, whose agent was

**POINTS.**

1. *The evidence presented no question requiring the submission of the case to the jury.*

(a.) *The note was not diverted.*

endeavoring to enforce the notes for the benefit of the Zinc Company.

The Court goes further and says, by way of *dictum*, that the result would be the same if the Miners' Bank were the beneficial owner. Without admitting the correctness of this *dictum* it would not apply to the present case in any event.

The case of an accommodation note, as in our case, is different. The maker gives the note, not to obtain a direct benefit himself, nor necessarily for any consideration from anyone, but for the immediate purpose of giving credit to the accommodated party. He may make the note payable to the accommodated party, or he may make it payable directly to the discounting party. In neither case can the accommodated party ever enforce the note against the maker. It was never intended that he should, while in the Bradshaw case the vendor could have done so, had the notes been payable to it and the consideration good. But, of course, it is intended that the discounting party shall be able to enforce the note against the maker.

The defences available to an accommodation maker, against parties who make the original discount, do not depend upon the formal order in which the parties appear on the face of the paper. The rights of the accommodation maker, in such cases, depend upon the substance of the transaction and not upon its form. If there has been a fraud-

**POINTS.**

1. *The evidence presented no question requiring the submission of the case to the jury.*

(a.) *The note was not diverted.*

lent diversion, known to the discounting party, he cannot recover of the accommodation maker, whether the note be payable to the accommodated party and by him transferred to the discounting party, or whether payable directly to the discounting party. On the other hand, if there has been no fraudulent diversion, within the legal meaning of this term, the discounting party's rights against the maker are the same, whether he took the paper directly or intermediately. When paper has been made for the purpose of accommodation, the question of what is a fraudulent diversion cannot depend on whether the discounting party is the payee or an indorsee. It is the same question always, and when answered it fixes the rights of the discounting party, no matter what his place on the instrument.

The same observations apply to the case of *Vorce v. Rosenbery*, 12 Neb., 448, cited in Mr. Willcox's supplemental brief at page 13. The other cases there cited are discussed elsewhere in this brief, or are irrelevant to the points herein involved.

The case of *Hagan vs. Bigler*, 49 Pac. Rep., 1011, also cited by plaintiff in error, has nothing to do with a case like the one at bar. The note there was delivered to a third party, in escrow, to be given to the payee on the delivery of certain property by the latter. It was given to the payee without the delivery of the property and without consideration, and in his hands was properly held unenforceable

**POINTS.**

*I. The evidence presented no question requiring the submission of the case to the jury.*

(a.) *The note was not diverted.*

against the maker. It is unnecessary to dwell upon the distinction between such a note and one given avowedly to obtain accommodation for the party in whose hands it was placed.

Numerous cases may be cited in support of the proposition that when an accommodation note, payable to a third party, is placed by the maker in the hands of the accommodated party, with a stipulation that it shall not be delivered until the performance of some condition, the maker is liable thereon to the payee, who in good faith and for value receives the note from the accommodated party in violation of the stipulation.

In *Jordan v. Jordan*, 10 Lea (Tenn.), 124, the defendant signed as a joint maker of a note, for the accommodation of one of the other makers, on condition that the note should not be used unless the signature of another person was also obtained. The accommodated party delivered the note to the innocent payee for value, in violation of this condition. The Court held the accommodation maker had no defence against the payee, saying at page 134 of the opinion :

"The learned and eminent counsel for the defendants in error thinks, he says, that it is impossible that any question of notice can arise on a negotiable instrument until it has passed out of the hands of the payee for a full consideration. But, if so, the original party to a note could never be a *bona fide* holder, and would, of course, be in a worse

**POINTS.**

*1. The evidence presented no question requiring the submission of the case to the jury.*

(a.) *The note was not diverted.*

situation than the obligee of an unnegotiable bond. The payee of a note, who receives it before maturity, without notice of any defect, having given for it his money, goods or credit at the time, or incurred loss or sustained some liability therefor, is a holder in due course of trade; *Cherry v. Frost*, 7 Lea, 1. And the suit was between the payee and the makers of negotiable securities in *Passumpsic Bank v. Goss*, 31 Vt., 315; *Millet v. Parker*, 2 Metc. (Ky.) 608; *Deardorff v. Foresman*, 24 Ind., 481; *Smith v. Moberly*, 10 B. Mon., 269. And the holder of the bill of exchange in *Merritt v. Duncan*, 7 Heis., 156, was the original holder, the bill being drawn payable to the drawer's own order."

To the same effect are the cases of *Deardorff v. Foresman*, 24 Ind., 481; *Whitcomb v. Miller*, 90 Ind., 384; *Micklewait vs. Noel*, 69 Iowa, 344; *Davis v. Gray*, 61 Tex., 506; *Passumpsic Bank v. Goss*, 31 Vt., 315; *Ward v. Hackett*, 30 Minn., 150; *Bonner v. Nelson*, 57 Ga., 433.

On facts involving the same principle the decision was the same, when the action was brought by the immediate indorsee of an accommodation indorser against the latter, (*Bank of Missouri v. Phillips*, 17 Mo., 29); and when the action was brought by the payee against the so-called irregular or anomalous indorser for the accommodation of the maker (*Merriam v. Rockwood*, 47 N. H., 81). In *Gage v. Sharp*, 24 Iowa, 15, the note was to be used by the accommodated party only on condition he

**POINTS.**

1. *The evidence presented no question requiring the submission of the case to the jury.*

(a.) *The note was not diverted.*

secured the accommodation maker by a mortgage. He delivered the note to the innocent payee for value, and the accommodation maker was not allowed to defend against the suit of the payee.

In the U. S. Supreme Court it is held that the sureties on a non-negotiable bond are liable to the innocent obligee, although the principal on the bond delivered it to the obligee in violation of a condition that it was not to be delivered until executed by other persons. *Dair v. United States*, 16 Wall., 1, cited with approval in *Arrowsmith v. Gleason*, 129 U. S., 86, 94. The case of a non-negotiable instrument is much stronger for the defendant than a case of negotiable paper like this one, and if the obligee is allowed to recover in the former case, it is submitted that the innocent payee must surely, in this case, even if it were true, which is strenuously denied, that there had been a diversion of the paper by Robinson.

### POINTS.

*1. The evidence presented no question requiring the submission of the case to the jury.*

(b) **There is no evidence that this note was used to pay the overdraft.**

As we have already seen, even if the note was used with others of the same character, obtained in like manner, for the purpose of covering up an overdraft at the bank, as claimed on page 9 of the brief for the plaintiff in error, such use was not a diversion, but was fairly within the scope of the language used by Robinson to Israel at the time the note was made; but instead of there being any evidence to support that claim, the only evidence in the case is to the contrary, namely, that other notes and deposits wiped out the overdraft, and that these notes created a new cash fund which was placed to Robinson's credit in the bank, and which evidently went to pay such new items as were thereafter presented (pp. 20, 26 and 29).

In support of the claim that this note with others went to pay the overdraft, the plaintiff in error, at page 9, subdivision 5 of his summary of facts, cites the statement of Edson, the book-keeper, on page 29, to the effect that "but for the discount of said three notes, including the notes in suit, said Robinson's account at said bank would have been overdrawn May 4, 1893, about \$50,000."

If those notes had not been deposited, it does not follow that there would have been any overdraft at all at the close of the day.

If no new fund had been created at the bank, the presumption is, first, that no new checks would have been drawn on the bank, and second, that in



**POINTS.**

*I. The evidence presented no question requiring the submission of the case to the jury.*

(b.) *There is no evidence that this note was used to pay the overdraft.*

the absence of a fund from which to pay them, such checks, if presented, would have been dishonored.

From the evidence of the book-keeper, on page 29, it appears that at the close of the day on May 4th, in addition to wiping out the overdraft of \$35,000 and paying the items coming through the exchanges of \$73,000, there was a balance to Robinson's credit of about \$4,000; which indicates total deposits for the day of \$112,000. It is evident, therefore, that if no new items had been presented for payment that day, Robinson's balance, at the close of the day, would have been about \$77,000, or the full amount of these notes, \$54,000 and a surplus of \$23,000 in addition, after the full payment of the overdraft shown by the bank books on the morning of May 4th. There is, therefore, nothing in the evidence to sustain the statement that the proceeds of this note were diverted from any purpose to which it had been restricted, or that it was used at all for the purpose of covering up the overdraft said to exist on the morning of May 4th.

Suppose, for the sake of argument, that the note did go to pay the overdraft, there is no evidence that the money represented by the overdraft had not gone into the power house, but on the contrary the only legitimate conclusion to be drawn from the evidence is that the indebtedness was incurred in the building of that very power house. Robin-

**POINTS.**

1. *The evidence presented no question requiring the submission of the case to the jury.*

(b.) *There is no evidence that this note was used to pay the overdraft.*

son did not tell him that he was going to build or intended to build, but that "he was building a power house," and that he had exceeded his line of discount. On the other hand, if it went to pay new items that came through the exchanges, there is no evidence but that these items were for funds to be or that had been devoted to that very purpose.

It was incumbent upon the maker who seeks to evade responsibility, even upon his own erroneous theory of the law applicable to this case, to prove in the first instance that the proceeds of the note were diverted from the purpose for which he says the note was given, namely, to aid in the construction of the power house, but his evidence proves the contrary. The overdraft may have been, and evidently was, incurred for that very purpose. If so, it was a necessary prerequisite to the obtaining of further funds for that purpose to pay up the indebtedness already incurred. The new items that came through the exchanges may have been given in payment for material, etc., to go into that very power house, if so, the proceeds of the note were applied in direct accordance with the technical claim contended for by the plaintiff in error. The burden of proving his defense was not met by merely showing that the proceeds were paid out on new items that came through the exchanges without showing the purpose of those items.

**POINTS.**

*1. The evidence presented no question requiring the submission of the case to the jury.*

(c) **At the time the bank received the note, it parted with full value therefor.**

The assertion to the contrary is the result not of any deduction from the evidence, but of the desire of the plaintiff in error to support his pre-conceived theory that the note was diverted from its original purpose and applied to the payment of an antecedent indebtedness. As has been already shown, by a reference to the testimony itself, the bank parted with full value, not to the maker of the note, but to Robinson to whom the note was delivered by the maker to be used for Robinson's purposes and for his benefit.

The counsel in his brief (p. 10) characterizes the discounting of the note as a "mere book-keeping transaction," although the testimony is undisputed that the bank parted with the full sum represented by the notes in cash at the time they were taken.

The giving of a \$17,000 note to his friend to enable him to secure further accommodations at the bank, may have been a mere matter of form to the irresponsible maker, but to the bank that was victimized it was an exceedingly serious transaction.

It is true Robinson did not take the proceeds of the notes in currency out of the bank at the moment of discount and cart them away; they were merely placed to his credit in the usual manner and a new cash fund created to be drawn upon as occasion might require.

**POINTS.**

1. *The evidence presented no question requiring the submission of the case to the jury.*

(c.) *At the time the bank received the note, it parted with full value therefor.*

But even if applied in payment of the overdraft or as additional security therefor, under the decisions of this Court, the bank would, nevertheless, be a holder for value.

Such a vast number of cases have been cited by the plaintiff in error, that time cannot be taken here to notice each one in detail. Every case cited has been examined. Many of them are wholly irrelevant upon any theory. Others are applicable to a particular state of facts not existing here. While others hold propositions at variance with the rules of law, long settled by this Court.

The New York cases seem to hold that where an accommodation note is fraudulently obtained or diverted and pledged as collateral security for a pre-existing indebtedness, the pledgee is not such a holder for value as to be entitled to recover. And a great number of cases are cited to sustain this proposition.

Now, upon the plaintiff in error's own theory, this note was either applied to the payment of a pre-existing indebtedness, or put up as additional security therefor.

If applied in payment of the indebtedness, then even under the New York cases the bank is entitled to recover.

In *Phoenix Ins. Co. vs. Church*, 81 N. Y., 225, after exhaustively collating the authorities on that point, the Court concludes as follows:

## POINTS.

*1. The evidence presented no question requiring the submission of the case to the jury.*

*(c.) At the time the bank received the note, it parted with full value therefor.*

"In view of this long line of authorities it must be regarded as the settled doctrine in this State that the surrender by a creditor of the past due notes of a debtor, upon receiving from him, in good faith, before maturity, the note of a third person, in place of the note surrendered, constitutes the creditor a holder for value of the notes thus taken, and protects him against the defenses and equities of the antecedent parties, and that it is immaterial whether the note surrendered was given to the creditor for goods sold, or money loaned, or under circumstances which would leave the original debt represented by the note in existence, enforceable against the debtor, or whether by surrendering the note, the creditor parted with his entire right of action."

And in the later case of Mayer vs. Heidelbach, 123 N. Y., 339, the Court, in discussing the case of Coddington vs. Bay (5 Johns., 57; 20 id., 637), which originated the difference between the courts of New York State and the concurring views of the Federal Courts and those of England, the opinion says:

"While it was in that case ruled that the transfer of negotiable paper as collateral security merely for an antecedent debt did not make the creditor a holder for value within the rule cutting off prior equities, it was yet asserted that such result followed where, among other things, some existing

**POINTS.**

*1. The evidence presented no question requiring the submission of the case to the jury.*

(c.) *At the time the bank received the note, it parted with full value therefor.*

debt was satisfied thereby. And that, I think, was a natural and logical conclusion from the reasoning upon which the decision rested \* \* \* And so we have steadily decided."

Citing numerous cases.

But without going to unnecessary length in the discussion of the hair-line distinctions to be found in some of the New York cases, suffice it to say, that this case, having been brought in the Federal Court, is to be decided in accordance with the Federal decisions.

In the case of Swift vs. Tyson, 16 Peters, page 1, in which the Supreme Court of the United States discusses the case of Coddington vs. Bay, 20 Johns., 637, in which the difference between the courts of New York and the Federal Courts originated, on the subject of what constituted a holder for value, the Court, discussing the claim that under the 34th section of the Judiciary Act it was incumbent upon the Federal tribunal to decide controversies arising out of New York contracts in accordance with New York decisions, the Court says, at page 19: "And we have not now the slightest difficulty in holding that this section upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and

### POINTS.

1. *The evidence presented no question requiring the submission of the case to the jury.*

(c.) *At the time the bank received the note, it parted with full value therefor.*

effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence \* \* \* It becomes necessary for us, therefore, upon the present occasion, to express our own opinion of the true result of the commercial law upon the question now before us. And we have no hesitation in saying that a pre-existing debt does constitute a valuable consideration in the sense of the general rule already stated, as applicable to negotiable instruments. \* \* \* \* \* We are prepared to say, that in receiving it in payment of, or as security for a pre-existing debt, is according to the known usual course of trade and business. \* \* \* But establish the opposite conclusion; \* \* \* what, indeed, upon such a doctrine, would become of that large class of cases, where new notes are given by the same or by other parties, by way of renewal or security to banks, in lieu of old securities discounted by them, which have arrived at maturity ? \* \* \* The doctrine would strike a fatal blow at all discounts of negotiable securities for pre-existing debts."

In Railroad Company vs. National Bank, 102 U. S., page 14, the doctrine laid down in Swift vs. Tyson, is reaffirmed in a very instructive opinion.

In the syllabus of the case the following propositions are laid down:

"The transfer by indorsement to a creditor of

**POINTS.**

1. *The evidence presented no question requiring the submission of the case to the jury.*

(c.) *At the time the bank received the note, it parted with full value therefore.*

negotiable paper before maturity, merely as security for an antecedent debt, although it is without his express agreement for indulgence, is not an improper use of such paper, and is as much in the usual course of commercial business as its transfer in payment of the debt. In neither case is the *bona fide* holder affected by equities or defences between prior parties of which he had no notice.

"The Courts of the United States are not controlled by the decisions of State courts on questions of general commercial law. *Swift vs. Tyson* (16 Pet. 1) and *Oates vs. National Bank* (100 U. S. 239) reaffirmed."

After discussing the New York cases and laying down numerous propositions concerning which there is no conflict, the Court says at page 26:

"Upon these propositions there seems at this day to be no substantial conflict of authority. But there is such conflict where the note is transferred as collateral security *merely*, without other circumstances, for a debt previously created. One of the grounds upon which some courts of high authority refuse, in such cases, to apply the rule announced in *Swift vs. Tyson* is, that transactions of that kind are not in the usual and ordinary course of commercial dealings. But this objection is not sustained by the recognized usages of the commercial world, nor, as we think, by sound reason."

See also the recent cases of *Doe vs. Northwestern Coal and Transportation Company*, 78 Fed. 62.

*Greenway vs. U. D. Orthwein Grain Co.,*  
85 Fed. 536.

**POINTS.**

1. *The evidence presented no question requiring the submission of the case to the jury.*

(d) **The note was discounted in good faith and in the usual course of business.**

At the time the notes were presented the cashier inquired of Col. Robinson as to the responsibility of the makers, and was assured by him that they were able to pay the notes (p. 20).

A letter was shown him by Robinson at the time which created this same impression (p. 21).

On page 25, the cashier says, "I believed the makers would pay them."

And this belief will not be thought unnatural when it is remembered that at that time Robinson was believed by every one to be a man of great wealth and of spotless character, to whom a mean act or a false representation would be an absolute impossibility.

It is strongly urged as an evidence of bad faith that previous to the time the bank took the notes, Robinson had procured to be discounted at the bank about \$300,000 of other paper made by other parties, and that there had been discounted for the benefit of members of the cashier's family paper to the amount of about \$107,000 (see brief, page 10, subdivision 10, and page 36.)

One of the purposes of banks of discount is to discount paper, and in the absence of any evidence that there was a dollar of bad paper in the \$300,000 of previous paper offered for discount by Robinson, or the \$107,000 of paper alleged to have been discounted, not for Bush, but for members of his family, there was nothing before the jury from

**POINTS.**

1. *The evidence presented no question requiring the submission of the case to the jury.*

(d.) *The note was discounted in good faith and in the usual course of business.*

which they would be permitted to find the slightest suspicion of impropriety concerning that previous paper. The mere fact that that paper had been previously discounted in the regular course of business was no evidence of bad faith or collusion or improper conduct on the part of any one in connection with subsequent discounts.

There is not a word anywhere in the evidence reflecting on that paper upon which the jury could base a finding that a single dollar of it was worthless or uncollectible. Every dollar of it may have been gilt edged, and in the absence of any evidence to impeach it, the jury would not be prevented from saying that because the present paper turned out to be worthless, undoubtedly the previous paper must have also been worthless, and then after reasoning backwards in that way and arriving at that conclusion, convert the conclusion into a premise and say that the fact that the previous paper was worthless and collusive, was evidence to show that the discounting of the subsequent paper was also in bad faith and collusive.

It will be remembered that all the witnesses in the case were called by the plaintiff in error, but he insists that he has the right to have the jury disregard the testimony and find a lack of *bona fides*, not only without evidence, but in contradiction of the affirmative testimony of his own witnesses; and in support of this extraordinary proposition he

**POINTS.**

1. *The evidence presented no question requiring the submission of the case to the jury.*

(d.) *The note was discounted in good faith and in the usual course of business.*

cites the Diefendorf cases, and others to be found on page 19 of his brief.

In each of those cases the witness called, whose credibility was held to be a question for the jury, was either the plaintiff himself, or some person directly interested in the result, *called by the plaintiff*, and fraud in the inception of the note having been shown, the court held that the credibility of the interested witness was for the jury to determine. But there is no authority for the proposition that he has a right to have the jury pass upon the credibility of his own witnesses, and find in opposition to their undisputed testimony. It is a novel proposition that if witnesses called by a party fail to testify as desired, he can then insist that the jury may disregard their evidence and render a verdict in opposition thereto. The effect of his claim is that his right to submit the case to the jury grows stronger as the proofs submitted by himself grow weaker, leaving him in a better position by calling witnesses from whom no favorable testimony could be elicited than if no witness had been called at all.

Where a party calls a witness, he has no right to have his evidence submitted to the jury for the purpose of affecting his credibility where it is uncontradicted and unimpeached.

In the case of American Exchange Nat. Bank vs. N. Y. Belting, etc., Co., 148 N. Y., 704, the Court

### POINTS.

*I. The evidence presented no question requiring the submission of the case to the jury.*

*(d.) The note was discounted in good faith and in the usual course of business.*

says: "Nor do we think that Corey's credibility as a witness should have been passed upon by the jury. He was called as a witness by the defendant.

\* \* \* If the defendant relied upon his evidence to defeat the plaintiff's right to recover, by showing a wrongful diversion of the notes, it surely was competent for the plaintiff, out of the mouth of the same witness, to show the nature of the transaction," etc.

**(e) The bank did not know but that full consideration had passed from Robinson to the maker of the note.**

When Robinson, a rich and reputable man, well known and of the highest standing, came with a note made directly to the bank by a maker not indebted to the bank, the presumption would naturally be that some consideration must have passed before the maker parted with its possession.

There was nothing in the circumstances that would require the bank to make inquiry as to the original consideration. There was nothing unusual about it, and the bank would have the right to assume that a consideration had passed.

"A bank has a right to assume, as to notes offered to it, whether for discount or as collateral security, by a customer who has an account with it and who is in the habit of borrowing money from it, that the customer is acting in good faith and within his lawful rights; and the fact that the cus-

**POINTS.**

1. *The evidence presented no question requiring the submission of the case to the jury.*

(e.) *The bank did not know but that full consideration had passed from Robinson to the maker of the note. tomer is engaged in the business of note-brokerage is not enough to deprive the bank of the right to indulge in such assumption."*

Am. Ex. Nat. Bank vs. N. Y. Belting,  
etc., Co., 148 N. Y., 698.

See also Doe vs. Northwestern Coal and Transportation Co., 78 Fed., 62.

If Robinson had been a man who was not known to be engaged in large transactions, or was known to be without financial standing, or of doubtful reputation, or offered to dispose of the paper at an inadequate price, a different question might arise to which some of the authorities cited by the counsel for the plaintiff in error might have some application.

But absolutely no fact appears that would put the bank upon its inquiry.

The contention of the plaintiff in error upon this point seems to be that Robinson controlled the policy of the bank, and that his knowledge was therefore the knowledge of the bank, a contention, however, which finds no support in the evidence as an examination will at once reveal.

In support of this statement the testimony of Jackson Richardson, the President of the bank, is relied on. Being president of the bank it was his duty, of course, to know something about its affairs, but his testimony reveals that

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*I. The evidence presented no question requiring the submission of the case to the jury.*

(e.) *The bank did not know but that full consideration had passed from Robinson to the maker of the note.*

he didn't pretend to know anything definitely, but evidently regarded himself as the merest figure-head. On page 16, he says: "My absences during the period I held the office of president were from one week to three months. In all, half of my time was spent away from Elmira; six months in Elmira and six months out of Elmira. Every day while I was in town and my health was proper, I managed the business of the bank the same as I managed my own business." And then at folio 85 he artlessly describes how he managed his own business: "I did not look over at all the individual notes which have been discounted at the bank. There was a committee for that business. And then I would talk with the committee. *I manage my own personal business that way. I ask my partner what notes he has and how they stand. I never look at them; don't know whether I have a note or not,*" and at the bottom of page 12: "The details I did not look after much myself; I wasn't there to do it; I didn't have my health to do it; I looked that over just as I did my own business; took a general survey." He says he had no knowledge of these notes (p. 15), because he was absent from the city at the time. "I went to New York the first of May and came back the 19th of May" (p. 16).

In support of the proposition that Robinson controlled the policy of the bank, pages 12 and 13 are

**POINTS.**

*1. The evidence presented no question requiring the submission of the case to the jury.*

(e.) *The bank did not know but that full consideration had passed from Robinson to the maker of the note.* first cited, where it is undoubtedly intended to call attention to the following:

"Q. Who were the active members of the directory; the men who had the most to say about the business of the bank?

"A. Col. D. C. Robinson was the man. Mr. Bush, of course, he was cashier; he was a director also."

He, of course, was anxious to relieve himself by blaming some one else, and so on page 13, he continues: "Q. What members of your board, if some more than others controlled the policy of the bank? A. I think Mr. Robinson controlled."

But on the same pages, in answer to the counsel for the defendant below whose witness he was, he says: "Q. When you say that Col. Robinson and Mr. Bush were the most active of the directors, how did they display their activity? A. *By showing the standing of the bank, that is, especially Mr. Bush,* and giving us a statement of how the bank was working.

"Q. *Was there any part of the business which was deputed to Col. Robinson, or of which he took principal charge?* A. *No, I think not.*

"Q. Do you remember whether he was on any committees with the directors? A. My impression is he was not. Q. Then why do you say he was one of the most active of the directors? A.

### POINTS.

*1. The evidence presented no question requiring the submission of the case to the jury.*

(e.) *The bank did not know but that full consideration had passed from Robinson to the maker of the note.*

Well, he and Mr. Bush consulted together as much perhaps, more than others.

"Q. How do you know they consulted together?

"A. Well, sir, *I don't know it, only what I hear talked by other parties in the bank.*

"Q. *Did you see them in consultation? A. No, sir; I might say right here, most of the time I was out of the City, I was not here looking very much of the time myself.*"

On page 13 this witness further says: "Col. Robinson did not ask me to discount paper for him. I suppose he asked Mr. Bush. Such discounts as Col. Robinson obtained either for himself personally, or for the company of which he was president, were obtained through Mr. Bush, the cashier."

And then he adds, speaking of Bush: "I suppose he followed the directions of the directors, not of Col. Robinson" (p. 14).

And on page 16: "Col. Robinson usually obtained discounts through Mr. Bush and the finance committee."

In the last line on page 17 and top of page 18: "I suppose that all those notes were submitted to the finance committee."

And then he tries to say that since the bank's failure it looks as if paper might have dis-

**POINTS.**

1. *The evidence presented no question requiring the submission of the case to the jury.*

(e.) *The bank did not know but that full consideration had passed from Robinson to the maker of the note.*

counted that was not submitted to the finance committee. He doesn't know a thing about it, frankly admits that he doesn't, can't show a single fact showing any control by Robinson, nor a single instance where Robinson procured any paper to be discounted without the knowledge of the finance committee or in opposition to their wishes. And yet from the loose statements of this witness, without a single fact to support the claim, it is seriously contended that Robinson controlled the bank and practically was the bank. This witness does not pretend to show a direction at any time on any subject given by Robinson to Mr. Bush or anyone connected with it in regard to any matter connected with the bank's policy or business.

But even if Bush did discount paper on his own account without consulting the finance committee, whatever else it may indicate it does not show that Robinson controlled the policy of the bank.

Robinson in this transaction was acting exclusively for himself and in his own interests and not for the bank, and under such circumstances the fact that he was a director does not make his knowledge the knowledge of the bank nor make his action the action of the bank.

In Mayor vs. Tenth National Bank, 111 N. Y., 446, the Court on page 457 says:

"But it is claimed that knowledge of the conspiracy and fraud must be imputed to the bank,

### POINTS.

*1. The evidence presented no question requiring the submission of the case to the jury.*

(e.) *The bank did not know but that full consideration had passed from Robinson to the maker of the note.*

because three of the conspirators, Ingersoll, Tweed and Connolly were directors of the bank, and hence that the bank could not claim the benefit of good faith. But none of these directors represented the bank in these transactions and in no way acted for the bank in them. Connolly was consulted as comptroller, and Ingersoll acted for the commissioners. Neither of them was present at any meeting of the directors when any action was taken in reference to the advances. \* \* \* \* The knowledge these conspirators had while engaged in their fraud for their own benefit could not, therefore, be attributed to the bank; and to this effect are all the decisions."

Citing numerous cases.

"The fact that a director of a corporation, the payee of the note was also president of the bank and that he received the note from the payee, to be offered to the bank for discount, is not sufficient; he is under no obligation in such case to state to the board of directors of the bank his opinion as to the liability of the parties appearing as makers upon the note."

Merchants Nat. Bank vs. Clark, 139 N.  
Y., 314.

It seems to be assumed by the defendant below that because Robinson stated to him at the time he

**POINTS.**

1. *The evidence presented no question requiring the submission of the case to the jury.*

(e.) *The bank did not know but that full consideration had passed from Robinson to the maker of the note.*  
made the note that he would not be called upon to pay it, that that is a defense.

"It was his theory and his testimony that the cashier and the teller of the bank requested him to permit them to use his name in stock speculations, and stated that they desired his name on notes which would be discounted by the bank for that purpose, for the reason that their names ought not to appear in that way by reason of their official relations with the bank, and that they agreed that the bank would take care of the notes as they became due. \* \* \* Conceding his testimony to be true, and that he expected the officers of the bank to take care of his notes as they became due, and that they were given for the purpose of raising money as he states, yet that was no defense for him against the notes in the hands of the bank. Having made the paper, he was under obligation to pay it."

Mead vs. National Bank, 89 Hun, 103,  
4, 5.

First Nat. Bank of Whitehall vs. Tisdale, 18 Hun, 151.

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II.

The verdict was properly directed for the plaintiff below and the judgment entered thereon should be affirmed with costs.

WILSON S. BISSELL,

*Attorney for Defendant in Error,*

558 Ellicott Square,

Buffalo, N. Y.

MARTIN CAREY,

*Of Counsel.*

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in the hands of David C. Robinson, without any consideration, for a particular purpose, and that if it had been discounted by Robinson at the Elmira National Bank such action on his part constituted a diversion from the purposes for which the note had been drawn and delivered; that from the form of the note (its being made payable to the bank), from the official connection of Robinson with the bank, he being one of the directors, and his personal relations with the cashier of the bank, as well as from many other circumstances which it is unnecessary to detail, the bank was charged with such notice as to the diversion of the note by Robinson as prevented the bank from being protected as an innocent third holder for value.

Second. Even if the discount of the note was not a diversion thereof from the purpose contemplated by the drawer, the bank was nevertheless subject to the equity arising from the want of consideration between Israel, the drawer, and Robinson, because, although the note may have been in form discounted by the bank, it had in reality only been taken by the bank for an antecedent debt due it by Robinson. And from this it is asserted that as the bank had not parted, on the faith of the note, with any actual consideration, it was not a holder for value, and was subject to the equitable defences existing between the original persons.

At the trial the plaintiff offered in evidence the note, the signature and the discount thereof being in effect admitted, and then rested its case. The defendant thereupon offered testimony which it was deemed tended to sustain his defences. At the close of the testimony the court, over the defendant's exception, instructed a verdict in favor of the plaintiff. On error to the Court of Appeals this action of the trial court was affirmed.

Both the assignments of error and the argument at bar but reiterate and expand in divers forms the defences above stated and which it is asserted were supported by evidence competent to go to the jury, if the trial court had not prevented its consideration by the peremptory instruction which it gave.

The bill of exceptions contains the testimony offered at the trial, and the sole question which arises is, Did the court

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rightly instruct a verdict for the plaintiff? From the evidence it undoubtedly resulted that the note was delivered by the maker to D. C. Robinson, by whom it was discounted at the Elmira National Bank. It also established that Robinson at the time of the discount was a director of the bank, had large and frequent dealings with it, that he bore close business and personal relations with the cashier, and occupied a position of confidence with the other officers and directors of the bank. The occasion for the giving of the note and the circumstances attending the same are thus shown by the testimony of the defendant:

"I reside in Brooklyn. I am 42 years of age. I am at present engaged in the insurance business. In the months of April and May, 1893, I was employed in the banking house of I. B. Newcomb & Co., in Wall street, New York, as a stenographer and typewriter. I was not then and am not now a man of property. I know D. C. Robinson. At the time I made this note I did not receive any valuable thing or other consideration for the making of it; I have never received any consideration for the making of the note. I had a conversation with D. C. Robinson at the time of the making of the note. He stated to me the object or purpose for which he desired the note. He said to me that he desired some accommodation notes, and he wanted us clerks to make them, and stated the amount. He said that the reason he wanted the accommodation note was that he had exceeded his line of discount and could not get any more accommodation; that he was building a power house up there (in Elmira) and needed some money to accomplish that purpose, and that if we would give him these notes it would enable him to accomplish that. He also added that we would not be put in any position of paying them at any time; that he would take care of them, and gave us positive assurance on that point, and naturally knowing the man, and thinking that he was a millionaire, as he probably was at that time, we had no hesitation about going on the notes."

There was no testimony tending to refute these statements or in any way calculated to enlarge or to restrict them.

## ISRAEL v. GALE.

### ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 265. Argued April 25, 26, 1899. — Decided May 15, 1899.

In this case the trial court at the close of the testimony, which is detailed in the opinion of this court, instructed a verdict in plaintiff's favor, which was affirmed by the Court of Appeals. This court affirms the judgment of the Court of Appeals.

THE case is stated in the opinion.

*Mr. Frank Sullivan Smith* for plaintiff in error.

*Mr. Martin Carey* for defendant in error. *Mr. Wilson S. Bissell* was on his brief.

MR. JUSTICE WHITE delivered the opinion of the court.

The receiver of the Elmira National Bank, duly appointed by the Comptroller of the Currency, sued George M. Israel, the plaintiff in error, on a promissory note for \$17,000, dated New York, May 14, 1893, due on demand, and drawn by Israel to the order of the Elmira National Bank, and payable at that bank. The defences to the action were in substance these:

First. That the note had been placed by Israel, the maker,

## Opinion of the Court.

The defence, then, amounts to this: That the form of the paper and Robinson's relation with the bank and its officers were such as to bring home to the bank the knowledge of the transaction from which the note arose, and that such knowledge prevents a recovery, because Robinson, taking the transaction to be exactly as testified to by the defendant, was without authority to discount the note. Granting, *arguendo*, that the testimony tended to show such a condition of fact as to bring home to the bank a knowledge of the transaction, the contention rests upon a fallacy, since it assumes that the note was not given to Robinson to be discounted, and that his so using it amounted to a diversion from the purpose for which it was delivered to him. But this is in plain conflict with the avowed object for which the defendant testified the note was drawn and delivered, since he swore that he furnished the note because he was told by Robinson that he needed accommodation, that his line of discount on his own paper had been exceeded and that if he could get the paper, of the defendant, he would overcome this obstacle; in other words, that he would be able successfully to discount the paper of another person when he could not further discount his own. This obvious import of the testimony is fortified, if not conclusively proven by the form of the note itself, which, instead of being made to the order of Robinson, was to the order of the Elmira National Bank. The premise then, upon which it is argued that there was proof tending to show that the discount of the note by Robinson at the Elmira National Bank was a diversion, is without foundation in fact. The only matters relied on to sustain the proposition that there was testimony tending to establish that the note was diverted, because it was discounted at the bank to whose order it was payable, are unwarranted inferences drawn from a portion of the conversation, above quoted, which the defendant states he had with Robinson when the note was drawn and delivered. The part of the conversation thus relied upon is the statement that Robinson said, when the note was given, "that he was building a power house up there (in Elmira) and needed some money to accomplish that purpose, and if we would give him these notes it

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would enable him to accomplish that." This it is said tended to show that the agreement on which the note was given was not that it should be discounted at the Elmira National Bank, but that it should be used by Robinson for obtaining money to build the power house. In other words, the assertion is that the mere statement, by Robinson, of the causes which rendered it necessary for him to obtain a note to be discounted at the Elmira National Bank had the effect of destroying the very purpose for which the note was confessedly given. When the real result of the contention is apprehended its unsoundness is at once demonstrated. Other portions of the record have been referred to, in argument, as tending to show that it could not have been the intention of the defendant, in giving the note, that Robinson should discount it, but on examining the matters, thus relied upon, we find they have no tendency whatever to contradict or change the plain result of the transaction as shown by the defendant's own testimony.

As the discount of the note at the Elmira National Bank was not a diversion, but on the contrary was a mere fulfilment of the avowed object for which the note was asked and to consummate which it was delivered, it becomes irrelevant to consider the various circumstances which it is asserted tended to impute knowledge to the bank of the purpose for which the note was made and delivered. If the agreement authorized the discount of the note, it is impossible to conceive that knowledge of the agreement could have caused the discount to be a diversion, and that the mere knowledge that paper has been drawn for accommodation does not prevent one who has taken it for value from recovering thereon, is too elementary to require citation of authority.

The contention that although it be conceded the note was not diverted by its discount, nevertheless the bank could not recover thereon because it took the note for an antecedent debt, hence without actual consideration, depends, first, upon a proposition of fact, that is, that there was testimony tending to so show, and, second, upon the legal assumption that even if there was such testimony it was adequate as a legal defence.

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The latter proposition it is wholly unnecessary to consider, because the first is unsupported by the record. All the testimony, on the subject of the discount of the note, was introduced by the defendant in his effort to make out his defence. It was shown, without contradiction, that the note had been discounted by Robinson at the bank, and that the proceeds were placed to his credit in account. It was also shown that for some time prior to the day of the discount his account with the bank, to the credit of which the proceeds of the discount were placed, was overdrawn. The exact state of the account on the day the discount was made was stated by the cashier and a bookkeeper of the bank, and was moreover referred to by Robinson. On the morning of the discount the debit to the account of Robinson, by way of overdraft, is fixed by the cashier at \$35,400, and by the bookkeeper at \$35,000. Robinson made the following statement: "The amount of other notes wiped out the overdraft and made a balance." The bookkeeper's statement is as follows:

"There was an overdraft of \$35,000 against Mr. Robinson upon the books of the bank on the morning of May the 4th. There were items coming through the exchanges that amounted to about \$73,000, and there was a deposit made of \$33,000 to make the overdraft good. These were to take up the items that came through the exchanges. I think that was the way of it. His account would have been overdrawn that night for about \$50,000 if it had not been for the entry on the books of the proceeds of these notes."

No other testimony tending to contradict these statements, made by the defendant's own witnesses, is contained in the record. They manifestly show that although at the date of the discount there was a debit to the account resulting from an overdraft that nearly the sum of the overdraft was covered by items of credit, irrespective of the note in controversy, and that subsequent to the credit arising from the note more than the entire sum of the discount was paid out for the account of Robinson, to whose credit the proceeds had been placed. With these uncontradicted facts in mind, proven by the testimony offered by the defendant, and with no testimony tending

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the other way, it is obviously unnecessary to go further and point out the unsoundness of the legal contention relied upon.

*Affirmed.*

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